No. 91-2024-CFX
Status: GRANTED

Title: Lamb's Chapel and John Steigerwald, Petitioners
v.
Center Moriches Union Free School District, et al.

Docketed:
June 16, 1992

Court: United States Court of Appeals for
the Second Circuit

Counsel for petitioner: Sekulow,Jay Alan

Counsel for respondent: Hoefling,John W., Abrams,Robert,
Slonim,Jeffrey I.

Entry	Date	Note	Proceedings and Orders
1	Jun 16 1992	G	Petition for writ of certiorari filed.
3	Jul 16 1992		Order extending time to file response to petition until August 7, 1992.
4	Aug 7 1992		Brief of respondent NY State Attorney General in opposition filed.
5	Aug 12 1992		DISTRIBUTED. September 28, 1992
6	Aug 24 1992	X	Reply brief of petitioners Lamb's Chapel, et al. filed.
7	Oct 5 1992		Petition GRANTED.
			**********
14	Oct 28 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Second Circuit.
15	Nov 9 1992		Record filed.
		*	Original proceedings United States District Court, Eastern District of New York.
8	Nov 18 1992		Brief amicus curiae of Ruthcrford Institute filed.
9	Nov 19 1992		Brief of petitioners filed.
10	Nov 19 1992		Joint appendix filed.
11	Nov 19 1992		Brief amici curiae of American Federation of Labor, et al. filed.
12	Nov 19 1992		Brief amicus curiae of United States filed.
13	Nov 19 1992		Brief amici curiae of Christian Legal Society, et al. filed.
17	Nov 19 1992		Brief of ACLU, et al. filed.
18	Nov 19 1992		Brief amicus curiae of National Jewish Commission on Law and Public Affairs filed.
16	Nov 20 1992		Brief amici curiae of Concerned Women for America, et al. filed.
19	Dec 4 1992	D	Motion of respondents for divided argument filed.
20	Dec 14 1992		Motion of respondents for divided argument DENIED.
23	Dec 18 1992		Brief amicus curiae of New York State School Boards Association, et al. filed.
24	Dec 18 1992		Brief of respondents Center Moriches Union Free School District, et al. filed.
22	Dec 21 1992		Order extending time to file brief of respondent on the merits until December 29, 1992.
25	Dec 28 1992		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 24,1993.(1ST CASE).
26	Dec 29 1992		Brief of respondent New York Attorney General's Office filed.
27	Jan 5 1993		CIRCULATED.
28	Feb 3 1993	X	Reply brief of petitioners filed.
29	Feb 24 1993		ARGUED.

91-2024

No.—

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

A school district in the state of New York makes its facilities available for community use for "civic, social, and recreational" purposes but forbids use by any group "for religious purposes." The pastor of a local church applied for permission to use school facilities to show a film series about family issues. The school district has denied permission because of the religious content of the film series.

1. Did the Second Circuit err in holding, in conflict with the First, Third, and Fifth Circuits, that a public school district may deny equal access to the use of its facilities during non-school hours solely on the basis of the religious content of the would-be user's speech, without violating with the First Amendment?

2. Did the Second Circuit err in holding, in conflict with the First, Third, Fourth, and Fifth Circuits, that public school facilities that are available for social, civic, and recreational use by the general public are not designated public fora for purposes of the right to free speech under the First Amendment?

3. Is the denial of equal access to public school facilities solely on the basis of the religious content of the would-be user's speech unconstitutional regardless of whether the facilities are "designated public fora," "limited public fora," or "nonpublic fora" for purposes of the right to free speech under the First Amendment?

4. Does the denial of equal access to public school facilities solely on the basis of the religious content of the would-be user's speech violate the Establishment Clause of the First Amendment?

PARTIES

The names of all of the parties to the proceeding in the court below appear in the caption of the case.*

*Petitioner Lamb's Chapel is a not-for-profit corporation. It has no parent company or subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. ——

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the court of appeals is reported as *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381 (2d Cir. 1992). The decision of the district court granting summary judgment is reported as *Lamb's Chapel v. Center Moriches Union Free School District*, 770 F. Supp. 91 (E.D.N.Y. 1991). The prior decision of the district court denying a preliminary in-

junction is reported as *Lamb's Chapel v. Center Moriches Union Free School District*, 736 F. Supp. 1247 (E.D.N.Y. 1990).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment in this case on March 18, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The New York statute governing community use of public school facilities, N.Y. Educ. Law § 414 (McKinney 1988), is set forth in Appendix D (App. 52a).

The regulations of the Center Moriches Union Free School District governing community use of public school facilities are set forth in Appendix E (App. 56a).

STATEMENT OF THE CASE

This is a case about official content- and viewpoint-based censorship of religious speech from a forum opened for general social, civic, and recreational use by the public.

Respondent Center Moriches Union Free School District makes its physical facilities available, during non-school hours, for social, civic, recreational, and other activities by members of the local community, but explicitly forbids use "by any group for religious purposes." Petitioners, a church and its pastor, have applied to use Center Moriches school facilities in order to show a film series, "Turn Your Heart Toward Home," by Dr. James Dobson. The school district has denied permission solely because of the religious content of the film series.

In the present action, petitioners seek injunctive and declaratory relief, under 42 U.S.C. § 1983, against the denial of their right to access, on equal terms with other members of the community, to the use of public school facilities.

A. Statement of Facts

Respondent Center Moriches Union Free School District (hereinafter "Center Moriches") is a subdivision of the State of New York duly organized to provide public education in Suffolk County. Center Moriches controls the use of various public school facilities including auditoriums, cafeterias and other meeting rooms.

New York state law authorizes the use of public school facilities for, *inter alia*, "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" provided that "such meetings, entertainment and uses shall be non-

exclusive and shall be open to the general public." N.Y. Educ. Law § 414(1)(c) (McKinney 1988 & Supp. 1992) (App. 52a).

Pursuant to this statute, Center Moriches has adopted official rules governing community use of school district facilities. Rules and Regulations for Community Use of School Facilities [hereinafter, "Rules & Regs."] (App. 56a). These rules explicitly authorize permits for, *inter alia*, "social, civic, or recreational use" when "non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event." Rules & Regs. #10 (App. 57a). Center Moriches has regularly granted permission to a multitude of groups to conduct activities in school facilities,[1] including the following (taken from the years 1987 through 1990):

Manorville Humane Society
Holiday Beach Property Owners Assoc.
Moriches Bay Civic Association, Inc.
Unkechaug Dance Group Cultural Program
Moriches Choral Society
H.E.L.P. (Helping Every Living Person) Meeting
Chamber of Commerce Annual Duck Race
Center Moriches Co-op Nursery School Quilting Project
PK Dance School Recital
Committee on the Busing Vote
Center Moriches Public Library
Moriches Pa-Qua-Tuck Squaws Chinese Auction
Hampton Council of Churches/Family Counseling Services Billy Taylor Concert

[1] The heavy, ongoing use of school facilities for a potpourri of activities by both school groups and outside organizations is plain from the record. During the week of Dec. 5-11, 1988, for example, there were twenty entries on the Center Moriches calendar for approved and scheduled uses of school district facilities. Plaintiffs' Ex. 3. This week was by no means atypical. *See id.* (March 13-19, 1989—18 uses); Plaintiffs' Ex. 4 (Nov. 13-19, 1989—23 uses; Feb. 5-11, 1990—26 uses).

Moriches Bay Power Squadron Boating Safety Instruction
Moriches Youth Organization
St. John the Evangelist Church Track Program K-8
Music Department/Salvation Army Dinner and Concert
Center Moriches PTA
Southern Harmonizers Gospel Singing
Brownie Troop # 1338
Brookhaven Kennel Club Dog Obedience and Breed Handling Classes

Plaintiffs' Exs. 4, 9a, 11a, 12a, 14, 20-23.

The official rules of Center Moriches, however, expressly forbid use of school premises "by any group for religious purposes." Rules & Regs., #7 (App. 57a).

Petitioner John Steigerwald is the pastor of an Evangelical Christian Church, petitioner Lamb's Chapel (App. 17a).

Pastor Steigerwald applied on two separate occasions for permission to use school facilities to show a film series about family issues. Each time Center Moriches rejected his application because of the religious content of the film.[2]

Pastor Steigerwald wrote to Mrs. Alice M. Schoener, business manager and district clerk of Center Moriches (Tr. 60), on Dec. 18, 1988, enclosing an application for

[2] Pastor Steigerwald had previously requested use of school facilities to conduct Sunday morning services during 1989. Plaintiffs' Ex, 5a. On the application Pastor Steigerwald indicated his willingness to abide by the Center Moriches Rules and Regulations "excluding #7" (the ban on use for religious purposes). *Id.* A school district official replied with a letter dated Nov. 23, 1988, stating that "in accordance with No. 7 of our currently existing rules and regulations, your request must be denied (see New York Education Law Section 414, which governs the board's position)." Plaintiffs' Ex. 5b. Pastor Steigerwald has not renewed his request to use school facilities on an ongoing basis for Sunday services, and his request for such use is not before this Court.

the use of school facilities for the presentation of a film series featuring Dr. James Dobson.[3] Plaintiffs' Ex. 6a. The series was to run in five parts, one evening each week for five weeks. *Id.* On the application form, Pastor Steigerwald noted that the purpose of the film presentation was "Family emphasis" and "to share some prac-[tic]al insight about the family." *Id.* Mrs. Schoener replied, in a letter dated Jan. 18, 1989, as follows:

> [W]e are bound by education law concerning the use of school facilities by religious organizations. Fortunately, we have not, to date, been put to the test of determining when a use of a facility by one of our local churches would constitute "religious purposes." I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations.
>
> . . . .
>
> If you care to pursue your request, please provide a more detailed description of your proposed use (including a brochure describing the film) . . . .

Plaintiffs' Ex. 6b.

On Feb. 2, 1989, Pastor Steigerwald responded to Mrs. Schoener's request for additional information by sending a brochure describing the planned film series, "Turn Your Heart Toward Home." Plaintiffs' Exs. 6c, 6d. Mrs. Schoener replied, on Feb. 8, 1989, that "[t]his film does appear to be church related and therefore your request must be refused." ~~Plaintiffs' Ex. 6d~~.

Pastor Steigerwald submitted another request on Oct. 23, 1989, once more seeking the use of school facilities for the Dr. Dobson film series. Plaintiffs' Ex. 7a. In response,

[3] Plaintiffs' Exhibit 6d includes a brochure describing the film series. The brochure identifies James C. Dobson, Ph.D., as a licensed psychologist, teacher, author of nine best-selling books, President of Focus on the Family, and host of a daily half-hour radio program broadcast across the country.

Mrs. Schoener wrote on Nov. 15, 1989, that "[t]his film does appear to be church related and therefore your request must be refused." Plaintiffs' Ex. 7b.

Pastor Steigerwald and Lamb's Chapel would be eligible, in general, to use Center Moriches facilities so long as their activities did not have "religious purposes." Mrs. Schoener testified, for example, that Pastor Steigerwald and Lamb's Chapel would be allowed to use school facilities for athletic purposes. Tr. 71. The reason Center Moriches has refused Pastor Steigerwald and Lamb's Chapel access to public school facilities to show a film series on families is the religious content of petitioners' planned film series. Plaintiffs' Exs. 6b, 6d, 7b.

B. Course of Proceedings

Lamb's Chapel and John Steigerwald (collectively, "Lamb's Chapel") filed suit in federal district court on February 9, 1990, naming as defendants both Center Moriches Union Free School District and Louise Tramontano in her official capacity as president of the Board of Education for Center Moriches Schools (collectively, "Center Moriches"). Lamb's Chapel requested an injunction requiring Center Moriches to let Lamb's Chapel use school facilities to show the planned Dr. Dobson film series and forbidding Center Moriches from discriminating against religious groups "because of the religious content . . . of their speech." Complaint ¶ 36. Lamb's Chapel also sought a declaration that Center Moriches had created an "open forum," had engaged in unconstitutional content discrimination against Lamb's Chapel's speech and religious beliefs, had violated Lamb's Chapel's federal constitutional rights to free speech, freedom of assembly, equal protection, and free exercise of religion, and had violated the Establishment Clause of the First Amendment. *Id.* ¶ 37.

Center Moriches responded by relying upon section 414 of the New York Educaton Law. Center Moriches alleged

that this statute precludes the use of school district premises for religious purposes,[4] Answer ¶ 39, and that the school district's official rules governing the use of Center Moriches facilities (including the ban on uses for religious purposes) were in conformity with section 414, *id.* ¶¶ 36, 54. Center Moriches denied that it had created an open forum and maintained that its Board of Education "controlled" the use of school facilities. *Id.* ¶¶ 42, 45. Finally, Center Moriches claimed that it had a "compelling interest" in protecting elementary and secondary students from "proselytizing religious ideas of various religious groups and entities," and that section 414 furthered that government interest. *Id.* ¶¶ 48, 49.

On May 18, 1990, the U.S. District Court for the Eastern District of New York denied Lamb's Chapel's motion for a preliminary injunction. *Lamb's Chapel v. Center Moriches Union Free School District*, 736 F. Supp. 1247 (E.D.N.Y. 1990) (App. 35a).

Lamb's Chapel appealed from the denial of the preliminary injunction. At the suggestion of Staff Counsel for the Second Circuit, however, Lamb's Chapel withdrew its appeal and returned to the district court to obtain a final disposition and to allow the district court to reconsider its denial of injunctive relief in light of *Board of Education of Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990). *See* App. 18a.

Upon return of the litigation to the district court, Center Moriches clarified in its motion for summary judgment that it relied ultimately upon section 414 of the New York Education Law for its defense:

[4] Section 414 does not expressly forbid the use of school premises for religious purposes. *See* Appendix D (App. 52a) (text of statute). A New York appellate court, however, has construed section 414 to authorize use only for "enumerated purposes" and has concluded that becase "religious purposes" are not listed in the statute, no such use is authorized. *Trietley v. Board of Educ.*, 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978).

> In the absence of Section 414 of the Education Law establishing a clear State policy, we would concede that the School District would be obligated to allow access to the facilities for religious groups on the same basis as any other group may be allowed access. However, in the face of Section 414 which limits the access that can be permitted to school district facilities, it is clear that the State has established a policy of precluding use for non-permitted purposes.

Mem. in Support of Motion for Summary Judgment at 15 (Nov. 15, 1990).

The district court granted summary judgment for Center Moriches. *Lamb's Chapel v. Center Moriches Union Free School District*, 770 F. Supp. 91 (E.D.N.Y. 1991) (App. 16a).

Lamb's Chapel appealed to the U.S. Court of Appeals for the Second Circuit. On March 18, 1992, that court affirmed the entry of summary judgment against Lamb's Chapel. *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381 (2d Cir. 1992) (App. 1a).[5]

The Second Circuit ruled that public property may be either a "traditional public forum," a "purposefully opened" public forum (including a "subcategory" of "limited" or "designated" public fora), or a "non-public" forum. *Id.* at 385-86 (App. 8a-9a). The court of appeals held that Center Moriches school facilities fall "within the subcategory of 'limited public forum,' the classification that allows it to remain non-public except as to specified uses." *Id.* at 386 (App. 10a) (citation omitted).

The court of appeals observed that while New York Education Law section 414 authorizes a variety of uses for public school property, including social, civic and recreational meetings, *id.*, "[r]eligious uses are nowhere permitted in this enumeration," *id.* The court noted that

[5] The New York State Attorney General's Office, which was not a party in the district court, intervened on appeal.

in a prior decision, *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 680 (2d Cir. 1988), the Second Circuit had "adopted a state court interpretation of section 414 that the use of New York school facilities is confined to nonreligious purposes," *Lamb's Chapel*, 959 F.2d at 387 (App. 10a-11a) (citing *Trietley v. Board of Educ.*, 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978) ("Religious purposes are not included in the enumerated purposes for which a school may be used under section 414 . . . . Consequently, the Board of Education had no authority to grant petitioners' request to form bible clubs in the public high schools")).[6]

Pursuant to *Trietley* and *Deeper Life*, the Second Circuit construed section 414 to render public school facilities "a limited public forum from which religious uses would be excluded." *Lamb's Chapel*, 959 F.2d at 387 (App. 11a) (citation omitted).

Relying upon *stare decisis*, the court of appeals held that in a "limited public forum," government may "impose a blanket exclusion on certain types of speech" so long as it does not "selectively deny access" among "expressive activities of a certain genre," *id.* (internal quotation marks omitted) (citing *Travis v. Owego-Apalachin School District*, 927 F.2d 688, 692 (2d Cir. 1991)). The court held that the only remaining question was whether Center Moriches "has opened its facilities to religious uses

[6] The *Trietley* decision predated both *Widmar v. Vincent*, 454 U.S. 263 (1981) (granting equal access, under First Amendment, to university facilities for student religious group), and *Board of Education of Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990) (granting equal access, under federal Equal Access Act, to high school facilities for student religious group). *Trietley* rejected an equal access claim by a high school student bible club. In *Deeper Life*, which also predated *Mergens*, the Second Circuit held that religious groups have no constitutional right of equal access *in general* to public school facilities, but that where—as in *Deeper Life*—the school district has *in fact* permitted prior *religious* uses, religious groups may have a valid claim to equal treatment.

and purposes" in the present case. 959 F.2d at 387 (App. 12a). Declaring this to be "a close question," *id.*, the court reviewed the evidence and concluded that "none of the prior uses" of Center Moriches property "were for religious purposes." *Id.* at 388 (App. 14a).

The court of appeals did not explain why Lamb's Chapel's planned film series would not be of the same "genre" as social, civic, recreational, or other permitted uses. Nor did the court identify any government interest—compelling, substantial, or even rational—that allegedly supported the exclusion of private users from government facilities solely on the basis of the religious content or purposes of the intended use.

REASONS FOR GRANTING THE WRIT

This case presents the question whether a public school district, which makes its facilities generally available for the activities of non-school community groups during non-school hours, may deny permission to use school facilities to show a film solely because of the religious content of that film.

Petitioner Lamb's Chapel wishes to show a film series on issues confronting modern families. If this *same* entity (Lamb's Chapel) sought to address the *same* topic (contemporary family issues) through the *same* medium (a film series), with the single difference that the film omitted all references to a religious perspective, Center Moriches would have no objection to the use of its facilities under the same terms as any other use by outside groups. But because the film series includes a religious point of view, Center Moriches has refused permission to show the film. This is blatant government censorship of private religious speech.

The decision of the Second Circuit, rejecting petitioners' claim to equal access to public school facilities, conflicts with the decisions of every other federal court of appeals

that has addressed the relevant issues, conflicts with the clear teachings of this Court, and presents important and recurring questions of constitutional law. Therefore, this Court should grant the petition for certiorari.

I. THE DECISION OF THE SECOND CIRCUIT DENYING EQUAL ACCESS TO SCHOOL FACILITIES DURING NON-SCHOOL HOURS FOR RELIGIOUS SPEECH IS IN CONFLICT WITH THE DECISIONS OF THE FIRST, THIRD, AND FIFTH CIRCUITS.

The Second Circuit held that a public school district may deny equal access to the after-school use of its facilities by outside organizations solely on the basis of the religious content or purpose of the planned use. This holding is in square conflict with the decisions of at least three other federal circuits:

—the First Circuit held, in *Grace Bible Fellowship, Inc. v. Maine School Administrative District # 5*, 941 F.2d 45 (1st Cir. 1991), that a policy not to lease school facilities to outside groups for activities "for the direct advancement of religion" was unconstitutional;

—the Third Circuit held, in *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990), that a school policy which forbade use of school facilities by outside groups "for religious services, instruction, and/or religious activities" was unconstitutional; and,

—the Fifth Circuit held that public school facilities which are made available to a variety of outside groups constitute a public forum for free speech, *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978), and that in such public forum property, a policy excluding religious groups is unconstitutional, *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989) (library auditorium).

The Seventh Circuit has strongly suggested, albeit in *dicta*, that it would embrace the same rule. *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1113-14 (7th Cir. 1986) (arbitrary exclusion of private religious speech from public school facilities would be unconstitutional). *Cf. Salinas v. School Dist. of Kansas City, Mo.*, 751 F.2d 288, 290 (8th Cir. 1984) (rejecting equal access claim because use permit was withdrawn on strictly procedural grounds and the "school district policy does not deny access to school facilities to religious groups"). *See also Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983) (overturning policy banning use of school facilities "for religious worship or other religious purposes").

Petitioners are aware of no federal court outside of the Second Circuit that has reached a contrary conclusion. Nor could a contrary view square with the clear teachings of this Court.

When a governmental body makes its facilities available for general use by private parties, it may not selectively exclude users on the basis of the religious content of their speech or activities. *Widmar v. Vincent*, 454 U.S. 263 (1981) (granting equal access, for student religious groups, to university facilities). This Court has explicitly held that the Establishment Clause—the typical defense offered for discrimination against private religious speech—presents no obstacle to the constitutional requirement of equal access. *Id.* at 271-75.

The fact that the present case involves high school facilities makes no difference. *Widmar* involved college students. But in *Board of Education of Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990), this Court held that equal access by *high school students* to school facilities rests securely within the scope of the holding in *Widmar*.

Accordingly, if a public school district opens its facilities for social, civic, and recreational activities by com-

munity groups, that district may not selectively deny access to otherwise qualified groups solely on the basis that their meeting or activity is for religious purposes.

In the present case, New York state law explicitly authorizes the use of public school facilities for, *inter alia*, "holding social, civic and recreational meetings and entertainments" which are "open to the general public," N.Y. Educ. Law § 414(1)(c) (App. 53a). The official rules and regulations of Center Moriches likewise authorize community groups to use school premises for, *inter alia*, "social, civic, or recreational use . . . ." Rules & Regs. # 10 (App. 57a). And in practice, Center Moriches has made its facilities available for a great variety of social, civic, and recreational activities by numerous groups (e.g., the Manorville Humane Society, the Unkechaug Dance Group, the Moriches Bay Civic Association, the Chamber of Commerce, and the Southern Harmonizers Gospel Group).

Nevertheless, Center Moriches expressly forbids the use of school facilities for religious purposes. Rules & Regs. # 7 (App. 57a). Because Lamb's Chapel wished to show a film series with religious content, Center Moriches barred it from school facilities.

In sustaining this plain denial of equal access for religious speech, the Second Circuit rendered a decision in square conflict with the decisions of the First, Third, and Fifth Circuits listed above.

II. THE DECISION OF THE SECOND CIRCUIT THAT PUBLIC SCHOOL FACILITIES WHICH ARE MADE AVAILABLE TO OUTSIDE GROUPS FOR SOCIAL, CIVIC, AND RECREATIONAL PURPOSES ARE NOT DESIGNATED PUBLIC FORA IS IN CONFLICT WITH THE DECISIONS OF THE FIRST, THIRD, FOURTH AND FIFTH CIRCUITS.

The Second Circuit held that the school facilities of Center Moriches are not public forum property for purposes of free speech, even though these facilities are

available for, *inter alia*, social, civic, and recreational use by the local community. This holding is in square conflict with the decisions of at least four other federal circuits.

The federal courts of appeals for the First, Third, Fourth, and Fifth Circuits have held that school facilities made available for social, civic, and recreational use by outside groups are designated public fora subject to the strict standards governing traditional public fora.[7] *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc); *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978). District courts in at least three other federal

[7] This Court regularly employs "forum" analysis in resolving claims of access to public property for purposes of free speech. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) ("we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or non-public"). There are "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802. Traditional public fora include property, such as public streets and parks, traditionally open to assembly and debate. *Id.* Designated public fora are facilities "not traditionally open to assembly and debate as a public forum" which government has "intentionally open[ed] . . . for public discourse." *Id.* Examples of designated public fora include university facilities made available for meetings of student groups, *Widmar v. Vincent*, 454 U.S. 263 (1981), municipal theaters made available for private dramatic productions, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), and school board meetings opened for citizen input, *Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). Nonpublic fora comprise property which is not by tradition or designation a forum for public communication, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), such as jailhouse grounds, *Adderley v. Florida*, 385 U.S. 39 (1966).

circuits have held the same. *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745, 752 (M.D. Tenn. 1990); *Wallace v. Washoe County School Dist.*, 701 F. Supp. 187 (D. Nev. 1988); *Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983). Petitioners are aware of no federal court outside of the Second Circuit that has held to the contrary.

In conflict with all of these decisions, the Second Circuit held in the present case that the school facilities of Center Moriches were not designated public fora subject to the strict standards governing public fora. 959 F.2d at 386 (App. 19a). Instead, the court below held that Center Moriches had created a "limited public forum" which, according to the Second Circuit, was the equivalent of a "nonpublic forum" for purposes of content-based exclusions from the use of school facilities. *Id.*[8] The court below reached this conclusion despite the explicit provision for social, civic, and recreational use by the community both in the relevant New York statute, N.Y. Educ. Law § 414(1)(c) (App. 53a), and in the official policy of Center Moriches, Rules & Regs. # 10 (App. 57a), and despite the consistent practice of Center Moriches allowing a diversity of outside groups to use its facilities, *see supra* pp. 4-5.

Public school facilities are not traditional public fora. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). But school facilities become *designated* public

[8] The Second Circuit plainly misapplied the concept of a "limited public forum." *Any* content-based exclusions of speech would be constitutional if the forum were defined, in circular fashion, by these very same exclusions. Center Moriches has not created a true limited forum in a manner that would bar Lamb's Chapel on the basis of its *status*—for example, by allowing use only by students, or only by students and their parents. *Cf. Widmar*, 454 U.S. at 267 n.5. Nor is this a case in which Center Moriches is conducting a public meeting while reserving control over the subject matter. *Cf. Madison Joint School Dist.*

fora when "school authorities have 'by policy or practice' opened those facilities 'for *indiscriminate use by the general public*,' . . . or by some segment of the public, such as student organizations." *Id.* (emphasis added; citation omitted). School authorities may not exclude otherwise eligible speakers[9] from designated public fora solely on the basis of the *content of their speech* unless the selective exclusion "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270 (citation omitted).

By disregarding this clear constitutional doctrine, the Second Circuit reached a decision that conflicts squarely with the decisions of at least four other circuits, as set forth above.

III. THE DECISION OF THE SECOND CIRCUIT SUSTAINING DISCRIMINATION AGAINST PRIVATE RELIGIOUS SPEECH CONFLICTS WITH THE DECISIONS OF THIS COURT EVEN UNDER THE DEFERENTIAL STANDARD GOVERNING NONPUBLIC FORA.

Center Moriches barred Lamb's Chapel from using school facilities solely because of the religious viewpoint of the film series Lamb's Chapel planned to show. By upholding this discriminatory exclusion, the Second Circuit rendered a decision that conflicts with the decisions of this Court even if the relevant forum is deemed nonpublic.

The court below effectively held that the school facilities of Center Moriches are nonpublic fora. Although the court purported to hold that the facilities were a "limited public forum," the Second Circuit made it clear that, in its view, the facilities are a "nonpublic forum" as to activities with religious contents or purposes. 959 F.2d at 386 (App.

[9] Excluding all *non-student* groups from designated public forum school facilities, for example, would be permissible. *Widmar*, 454 U.S. at 267 n.5.

10a). Even if this content-based forum analysis reflected proper constitutional doctrine—which it does not—the *per se* exclusion of religious speech by private persons would still fail the test for exclusions from nonpublic fora.

This Court has explained that "[c]ontrol over access to a nonpublic forum can be based on *subject matter* and *speaker identity* so long as the distinctions drawn are *reasonable* in light of the purpose served by the forum and are *viewpoint-neutral*." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (emphasis added). The exclusion in the present case fails even this deferential standard.

First, the discrimination in this case is not based on either *subject matter* or *speaker identity*. Lamb's Chapel wishes to show a film series on the issues confronting families in the modern age. If this *same* entity (Lamb's Chapel) proposed to address the *same* topic (the family) through the *same* medium (a film series), with the solitary difference that there were no references to a religious perspective, the series would clearly be unobjectionable to Center Moriches. Center Moriches is engaging in direct censorship of private religious speech.

Second, the *per se* exclusion of a religious perspective is *viewpoint-discriminatory*.[10] A rule banning religious speech is patently content-based. But as the facts of this case make clear, the exclusion of religious speech is also viewpoint-discriminatory. Lamb's Chapel is free to address the identical topic—the family in the modern world —*so long as it does not do so from a religious viewpoint*. A more flagrant policy of viewpoint exclusion would be difficult to imagine.

Third, there is simply *no reasonable basis* for the *per se* exclusion of speech based upon its religious content. Center Moriches claims to rely upon a state statute in defense of its discriminatory policy. In light of the federal Supremacy Clause, however, this statute can provide no rational defense. *Widmar* and *Mergens* render completely untenable any suggestion that speech by private parties, in school facilities available for use by a variety of outside organizations, could somehow trigger a violation of the Establishment Clause. Center Moriches has offered no other colorable rationale for its censorship of private religious speech, and the Second Circuit made no effort to identify any such rationale.

[10] *Cf. May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986) (discrimination against religious speech is restriction on a particular point of view).

Ultimately, then, Center Moriches is asserting the sheer power to exclude private religious speech for no better reason that just because Center Moriches says so. This assertion of a stark power of anti-religious discrimination is incompatible with the Constitution under any standard. *Accord Gregoire*, 907 F.2d at 1382 n.14 ("While we have . . . applied strict scrutiny analysis to the facts before us, we are by no means convinced that the reasons advanced by [the school district] for excluding [the religious group] could withstand review even under a rational basis standard"); *May*, 787 F.2d at 1113 (the "contention —that the school discriminates arbitrarily against one type of speech, religious speech—would if true establish an abridgment of free speech however one classifies the [school facilities] along the range of public-private forum").

IV. THE DECISION OF THE SECOND CIRCUIT UPHOLDING THE DISCRIMINATORY EXCLUSION OF PRIVATE RELIGIOUS SPEECH FROM PUBLIC SCHOOL FACILITIES CONFLICTS WITH THE DECISIONS OF THIS COURT UNDER THE ESTABLISHMENT CLAUSE.

The Second Circuit summarily rejected Lamb's Chapel's argument that the selective exclusion of religious speech on the basis of its content violates the Establishment

Clause, 959 F.2d at 389 (App. 15a). This holding conflicts with the relevant decisions of this Court.

First, a policy of equal access for religious speech conveys a message "of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 110 S. Ct. at 2371 (plurality). *Accord Gregoire*, 907 F.2d at 1380; *Grace*, 941 F.2d at 48.

The Establishment Clause of the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). On the contrary, "[s]tate power is no more to be used to handicap religions, than it is to favor them." *Id.*

Second, a policy of equal access for religious speech "would in fact *avoid* entanglement with religion," *Mergens*, 110 S. Ct. at 2371 (plurality) (citation omitted). Center Moriches would inevitably entangle itself unconstitutionally with religious affairs by the mere enforcement of its policy of religious exclusion. As this Court explained in *Widmar*, an educational institution which excludes private religious speech

> would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

454 U.S. at 272 n.11 (internal quotation marks and citations omitted). *Accord Gregoire*, 907 F.2d at 1381; *Country Hills*, 560 F. Supp. at 1218.

The ultimate purpose of the Establishment Clause was the safeguarding of religious exercise against the power

of the state. The present case presents a classic instance of explicit governmental oppression of religion. By sustaining this unconstitutional government policy, the Second Circuit disregarded the teachings of *Widmar*, *Mergens*, and other decisions of this Court construing the Establishment Clause.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

In view of the Second Circuit's clear departure from the decisions of this Court, and in view of the fact that the Second Circuit stands alone in pursuing this deviant course, in conflict with the consistent view of the other federal circuits, *see supra* §§ I, II, this Court should consider disposing of this petition by summary reversal of the judgment below under Rule 16.1.

Respectfully submitted,

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June 16, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 470—August Term, 1991

(Argued November 4, 1991 Decided March 18, 1992)

Docket No. 91-7718

LAMB'S CHAPEL and JOHN STEIGERWALD,
Plaintiffs-Appellants,

—against—

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO, in her official capacity as president of the Board of Education for Center Moriches Schools,

Defendants-Appellees,

NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Intervenor.

Before:

CARDAMONE, PIERCE and MINER,
Circuit Judges.

Appeal from summary judgment entered in United States District Court for the Eastern District of New York (Wexler, *J.* in favor of defendants School District and Board of Education President in action for declaratory and injunctive relief brought to redress defendants'

refusal to allow plaintiffs use of school facilities during non-school hours for showing of religious film series.

Affirmed.

MARK N. TROOBNICK, Washington, D.C. (Jordan W. Lorence, Concerned Women for America Legal Foundation, Jay A. Sekulow, Walter M. Weber, Free Speech Advocates, Washington, D.C., of counsel *for plaintiffs-appellants.*

HAROLD G. TRABOLD, Patchogue, N.Y. (Dranitzke, Lechtrecker & Trabold, Patchogue, N.Y., August H. Englert, Fiedelman & Hoefling, Jericho, N.Y., of counsel) *for defendants-appellees Center Moriches Union Free School District and Louise Tramontano.*

JEFFREY I. SLONIM, Assistant Attorney General, New York, N.Y. (Robert Abrams, Attorney General, Lawrence S. Kahn, Deputy Solicitor General, Attorney General's Office, State of New York, N.Y., of counsel) *for Intervenor New York State Attorney General.*

Jay Worona, Albany, N.Y. (Cynthia P. Fletcher, New York State School Boards Association, Inc., Albany, N.Y., of counsel) *for Amicus Curiae New York State School Boards Association, Inc.*

MINER, *Circuit Judge*:

Plaintiffs-appellants Lamb's Chapel and John Steigerwald appeal from a summary judgment entered in the United States District Court for the Eastern District of New York (Wexler, *J.*) in favor of defendants-appellees Center Moriches Union Free School District and Louise Tramontano, as President of the Board of Education of the School District. Lamb's Chapel is an Evangelical Christian church, incorporated under the New York not-for-profit corporation law, located at Center Moriches,

Suffolk County, New York. John Steigerwald is the Pastor of Lamb's Chapel. The School District is a subdivision of the State of New York duly organized to provide public education in Suffolk County. This action was brought to secure declaratory and injunctive relief as redress for the refusal of the School District to allow the use of School District facilities, during non-school hours, for the showing of a series of religious films. The School District relied on a New York statute as well as a local rule in denying use of the facilities.

In granting summary judgment, the district court determined that the School District's facilities were "limited public forms," which had not been opened to religious groups by policy or practice. Accordingly, the court concluded that the facilities properly were barred to the plaintiffs in accordance with the New York Education Law and the School District's own Local Rules.

On appeal, appellants contend that the School District, having created public forums by policy and practice, has excluded speech from the forum on the basis of content. This, they argue, is violative of the First Amendment. Appellants also contend that the denial to them of equal access to the School District's facilities, based on the religious content of their speech, is a violation of the Establishment Clause. Finally, they contend that a prior decision of this Court upholding the New York statute that allows the exclusion of religious groups from school district facilities in the absence of a practice of opening the facilities to other religious organizations is erroneous and should not be followed. Finding no merit in any of these contentions, we affirm the judgment of the district court.

BACKGROUND

By application dated November 19, 1988, Pastor Steigerwald sought the use of rooms in the Center Moriches High School for Lamb's Chapel Sunday morning serv-

ices and for Sunday School. The hours specified were 9:00 A.M. to 1:00 P.M., and the time period indicated was one year, beginning in December of 1988. The application was made on a form provided by the School District and entitled "Application For Use of School District Facilities." Attached to the application form was a sheet entitled "Rules and Regulations for Community Use of School Facilities." Rule No. 7 was set out as follows: "The school premises shall not be used by any group for religious purposes." Above his signature on the application form, Pastor Steigerwald indicated that he had read the Rules and Regulations and agreed to comply fully with them "excluding #7."

Accompanying the application, and dated November 21, 1988, was a letter to Alice Schoener, School District Clerk, from the Pastor. In the letter, Pastor Steigerwald introduced himself and his Church and noted that their "paramount objective [was] to share the love of Christ in very real and practical ways." He also indicated that he had taken a tour of the Center Moriches High School to "see if the school had adequate facilities for a movie series on the family that will be free of charge and open for the community to attend." Pastor Steigerwald stated in his letter that he had met with the high school principal, who was concerned that the content of the film be non-sectarian in view of the constitutional requirement for the "separation of church and state." The letter continued: "Those who espouse such a . . . view are seriously misinformed. Enclosed you will find several articles that correctly interpret the law that is presently being upheld by the Supreme Court of the United States of America."

By letter dated November 23, 1988 on behalf of the School District, Ms. Schoener advised Pastor Steigerwald that the application "requesting the use of the high school for your Sunday services," was denied, citing Local Rule No. 7 as well as the State Education law. Re-

ferring to scheduling problems, Ms. Schoener further advised that she was "very much afraid that, even without the prohibited religious activity aspect, your request would have to be denied." Undeterred, Pastor Steigerwald pressed forward on December 16, 1988 with another application for use of the high school facilities, the second application being limited to one evening per week for five weeks. The hours designated were 7:00 P.M. to 10:00 P.M. and the activity specified was "Family emphasis & Movie presentation by Dr. James Dobson." The purpose set forth was "To open up the film to share some pracital [sic] insights about the family." The facilities requested were the auditorium or gymnasium.

In response to the second application Ms. Schoener wrote to Pastor Steigerwald on January 18, 1989 to request "a more detailed description of your proposed use (including a brochure describing the film)," noting that she was "hard pressed to determine from your description, what the five-part movie would represent" but "suspect[ed] that it would certainly have religious connotations." In the letter requesting additional information, Ms. Schoener observed that "[t]he district has not, in the past, allowed the high school auditorium to be used by any group primarily for its own purposes."

A brochure describing the film, "Turn Your Heart Toward Home," was forwarded by Pastor Steigerwald to Ms. Schoener on February 2, 1989. According to the brochure, the film comes in a 6-part series "every parent should see." In the film, Dr. James Dobson, said to be an expert on family life, "reminds parents of society's slide toward humanism—the undermining influences of radio, television, films and the press—which can only be counterbalanced by a loving home where Christian values are instilled from an early age." In her response dated February 8, 1989, Ms. Schoener advised Pastor Steigerwald as follows: "This film does appear to be church related and therefore your request must be refused." Addi-

tionally, Ms. Schoener denied a request made by Pastor Steigerwald on February 2, 1989, for use of the elementary or high school on Friday or Saturday evenings "for 'non-religious purposes' such as volley ball." The reason given was: "We do not schedule outside organizations to use the facilities on Fridays and Saturdays."

Pastor Steigerwald continued to press his petition. On October 11, 1989, he submitted yet another application for the use of Center Moriches School District facilities to show the same film series, described in this application as a "Family oriented movie from a Christian perspective." The stated purpose for Lamb's Chapel was "To invite community of Center Moriches to view this very practical movie for family raising." Once again, the use of an auditorium for five week days over a five-week period was sought. This last application met with a terse response by Ms. Schoener: "This film does appear to be church related and therefore your request must be refused."

The complaint in this action was filed on February 9, 1990 and includes four causes of action: violation of the Freedom of Speech and Assembly Clauses; violation of the Equal Protection Clause; violation of the Free Exercise Clause; and violation of the Establishment Clause. As to each cause, the plaintiffs allege that the defendants' actions were taken under color of state law and in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1983. The injunctive relief sought was an order permitting plaintiffs the use of the auditorium of the high school or elementary school to show the film series and to allow religious groups use of the facilities without discrimination because of the religious content of their speech. Also sought was a judgment declaratory of plaintiffs rights to use the facilities in question in accordance with constitutional protections guaranteed by the First and Fourteenth Amendments, including the Free Speech, Freedom of Assembly, Free Exercise, Establishment and

Equal Protection Clauses of the Constitution. Plaintiffs also sought a declaration of the unconstitutionality of section 414 of the New York Education Law to the extent it bars the use of school district facilities for purposes of religious speech.

Plaintiffs' motion for a preliminary injunction to compel the School District to allow the use of the District's facilities was denied by the district court in a Memorandum and Order dated May 16, 1990. The court reviewed the facts presented on the motion as well as the applicable legal and constitutional principles and concluded that plaintiffs had "not shown either a substantial likelihood of success on the merits or sufficiently serious questions going to the merits." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 736 F. Supp. 1247, 1254 (E.D.N.Y. 1990). An appeal to this Court from the Order denying the preliminary injunction was withdrawn, and the matter was returned to the district court for further proceedings. Thereafter, the plaintiffs moved for summary judgment and the School District cross-moved for the same relief. After hearing testimony as well as considering exhibits and affidavits, the district court granted the School District's motion and denied the plaintiff's motion in a Memorandum and Order dated July 15, 1991, giving rise to this appeal.

In granting summary judgment, the district court found "that if the intended use of school facilities is not required or authorized by statute, there is no constitutional right to such use where a school district has not, by policy or practice, permitted a similar use in the past." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 770 F. Supp. 91, 98 (E.D.N.Y. 1991). Although it determined that the Center Moriches School District facilities are limited public forums, the court concluded that the "District ha[d] not, by policy or practice, opened its doors to groups akin to Lamb's Chapel," and therefore held "that the School District's denial of plaintiffs' ap-

plications to show the film series [was] viewpoint-neutral and, hence, constitutional." *Id.* at 99. We agree with the conclusion reached by the district court.

DISCUSSION

According to the Supreme Court, the extent of permissible governmental regulation of expressive activity on publicly owned property is dependent upon the character of the public property in question. *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). The Court has identified three categories of publicly owned property and has defined what regulatory power, consistent with the First Amendment, may be exercised in each category. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985).

The power of the State to regulate expression is most limited in regard to the category of public property designated "traditional public forum." Streets, parks and similar locales, said to "have immemorially been held in trust for the use of the public and [which], time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Hague v. CIO*, 307 U.S. 496, 515 (1939), fall within this classification. In such a forum, a regulation providing a content based exclusion may be enforced only when "necessary to serve a compelling state interest" and must be "narrowly drawn" to serve that purpose. *Perry*, 460 U.S. at 45. Also, narrowly tailored, content-neutral regulations pertaining to the time, place and manner of expression in a traditional public forum may be enforced, if they "serve a significant government interest, and leave open ample alternative channels of communication." *Id. See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The second category of public property pertinent to this analysis is made up of property purposefully opened

for use by the public for expressive activity. Although government is not required to open this sort of forum or to keep it open indefinitely, the regulation of expression in a locale encompassed within the second category must meet the same standards as are applicable to a traditional public forum. *Perry*, 460 U.S. at 46. Places opened specifically for the use of certain speakers or for the discussion of certain subjects are referred to as "limited" or "designated" fora. *See Longo v. U.S. Postal Service*, 953 F.2d 790, 793 (2d Cir. 1992); *Travis v. Owego-Apalachin School Dist.*, 972 F.2d 688, 692 (2d Cir. 1991). As to those fora, "the first amendment protections provided to traditional public forums only apply to entities of a character similar to those the government admits to the forum." *Calash v. City of Bridgeport*, 788 F.2d 80, 82 (2d Cir. 1986).

Least restricted is the power of government to regulate expression in the third category of public property—the non-public forum. Included in this category is property that is not open for communicative purposes either by tradition or designation. *Perry*, 460 U.S. at 46. With respect to such property, where governmental control is analogous to that of a private owner, *see United States Postal Service v. Council of Greenburgh*, 453 U.S. 114, 129-30 (1981), a reasonableness standard prevails, *see International Soc'y For Krishna Consciousness v. Lee*, 925 F.2d 576, 580 (2d Cir. 1991), *cert. granted*, 112 S. Ct. 855 (1992). The standard is met when the applicable restrictions "reflect a legitimate government concern and do not suppress the speaker's view." *See Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991).

The Center Moriches School District facilities appellants sought to use do not fall within the categories of "traditional public forum" or "non-public forum," and appellants do not contend that they do. What appellants do contend is that the school authorities in the Center Moriches School District by policy and practice have opened the facilities for the use of the general public and

that the exclusion of religious speech is prohibited under the standards governing the second category. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). An examination of pertinent policy and actual practices, however, convinces us that the school property in question falls within the subcategory of "limited public forum," the classification that allows it to remain non-public except as to the specified uses. *See Deeper Life Christian Fellowship v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir. 1988) (*Deeper Life I*).

In the matter of School District policy, the District is governed by section 414 of the New York Education Law and its own Local Rule No. 7. Section 414 sets out ten purposes for which the use of schoolhouse facilities may be granted throughout the State of New York: instruction; public library purposes; social, civic and recreational meetings; events for which admission fees are charged, if the fees are to be applied to educational and charitable (but not religious) purposes; elections and political meetings; civic forums and community centers; classes for mentally retarded minors; recreation and atheletics; child care services during non-school hours; and graduation exercises held by not-for-profit elementary and secondary schools, provided no religious service is performed. N.Y. Educ. Law § 414[1](a)-(j) (McKinney 1988 & Supp. 1992). Religious uses are nowhere permitted in this enumeration. All the uses specified are subject to such regulations as may be adopted by boards of education in the various school districts of the state, but the regulations must not conflict with the state law. *See id.* As previously noted, the Board of Education of the Center Moriches Union Free School District has provided in its Local Rule No. 7 that "[t]he school premises shall not be used by any group for religious purposes."

In *Deeper Life I* we adopted a state court interpretation of section 414 that the use of New York school facilities is confined to nonreligious purposes, *see Trietley*

v. Board of Educ., 65 A.D.2d 2d 1, 5-6, 409 N.Y.S.2d 912, 915 (4th Dep't 1978), and thereby ascertained the state's intent to create a limited public forum from which religious uses would be excluded. *See Deeper Life I*, 852 F.2d at 680. We determined in that case that under the statute and applicable New York City Board of Education regulations, the School Board had no discretion with respect to the granting of use permits to religious groups. *See Deeper Life Christian Fellowship v. Sobol*, 948 F.2d 79, 83 (2d Cir. 1991) (*Deeper Life II*).

Appellants argue, in effect, that once the school district facilities are opened as a public forum for one purpose, they are opened for all purposes. They take issue with our view that "property remains a nonpublic forum as to all unspecified uses . . . , and exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint-neutral to pass constitional muster," *Deeper Life I*, 852 F.2d at 679-80 (citations omitted), and contend that our view does not represent a proper interpretation of Supreme Court precedent. That challenge is barred by the rule of *stare decisis*, not only as a consequence of the *Deeper Life* cases but also as a consequence of our decision in *Travis*, where we held that "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." 927 F.2d at 692.

In *Travis*, the school district was constrained to open its facilities to a religiously-oriented, fund-raising entertainment event benefitting a pregnancy counselling organization affiliated with an organization that promoted Christian gospel evangelism, having previously opened the facilities to a religious Christmas program involving the collection of toys for needy children. "The Christmas program . . . created at least a limited public forum for fund-raisers with religious themes." *Id.* at 693. In

Deeper Life I, we sustained a preliminary injunction in a case in which a church sought the temporary use of an elementary school building, finding as a fair ground for litigation that "the School Board ha[d] opened this forum to t[he church] through a practice of granting permits to use public school facilities to other religious organizations." 852 F.2d at 680. Whether Center Moriches has opened its facilities to religious uses and purposes presents a close question here.

On appeal, appellants principally rely upon three prior uses of school district facilities to demonstrate a prior practice of opening Center Moriches public schools to outside of school religious uses: a Salvation Army Band Benefit Concert; a Gospel Music Concert; and a lecture series entitled "Psychology and the Unknown," given by Jerry Huck. The Band Benefit Concert involved performances by the Center Moriches High School Band as well as the Salvation Army Greater New York Youth Band. The money raised at this concert was used to provide a scholarship for a high school band member and to provide funds for children to go to summer camp. The only religious connotations found in the Joint Band Program were the invocation, the performance of a piece called "Jericho Revisited" and the finale, "God Bless America." Although appellants adduced evidence that "the Salvation Army is a church or a quasi-church," the Joint Band Program hardly can be described as any kind of a religious use of school district property. The theme of the Program was not religious and any reference to religion was incidental at best.

The Gospel Music Concert was performed by a group called the "Southern Harmonizers Gospel Singers." The purpose of the program was to raise money for the school's black student scholarship fund. The program consisted in the main of gospel and spiritual music. The business manager of the Singers defined gospel music as "the good news of God." Included in the program were

such well-known religious songs as "Amazing Grace!" and "The Lord is my Shepherd" from the Twenty-Third Psalm of the Old Testament. The business manager responded in the affirmative when asked if the concert could be enjoyed for the music itself. Obviously, this is so. Much of the world's greatest music has some religious connotation but can be enjoyed by people of all religious beliefs as well as people of no religious beliefs. The performance by the Southern Harmonizers was not a religious service or event but a musical and cultural one. It took place in a non-religious context and had a non-religious purpose.

The lecture series, "Psychology and The Unknown," by Jerry Huck, was sponsored by the Center Moriches Free Public Library. The library's newsletter characterized Mr. Huck as a psychotherapist who would discuss such topics as parapsychology, transpersonal psychology, physics and metaphysics in his 4-night series of lectures. Mr. Huck testified that he lectured principally on parapsychology, which he defined by "reference to the human unconscious, the mind, the unconscious emotional system or the body system." When asked whether his lecture involved matters of both a spiritual and a scientific nature, Mr. Huck responded: "It was all science. Anything I speak on based on parapsychology, analytic, quantum physicists [sic]." Although some incidental reference to religious matters apparently was made in the lectures, Mr. Huck himself characterized such matters as "a fascinating sideline" and "not the purpose of the [lecture]."

As is apparent from the foregoing, none of the prior uses pointed to by the appellants were for religious purposes. Nor are we able to discern any previous uses of any school district property for religious purposes upon an examination of the record. Incidental references to religion or religious figures, the occasional use of religious terms, and the performance of music with religious overtones do not convert a secular program into a religious

one. The programs cited as examples did not carry out religious themes nor were they presented in a religious context. We simply have not been able to identify any prior use of Center Moriches School District facilities for purposes that are religious in any meaningful way. We therefore conclude that the facilities were limited forums not opened to religious uses by policy or practice and that there was no constitutional violation in the failure of the School District to afford access to appellants.

Widmar v. Vincent, 454 U.S. 263 (1981) and *Board of Educ. of the Westside Community Schs. v. Mergens*, 110 S. Ct. 2356 (1990), relied upon appellants, do not dictate a contrary result. In *Widmar*, the Court held that a state university could not deny access to university facilities to *students* who wished to conduct religious meetings on campus. *Widmar*, 454 U.S. at 273. The Court found in that case that "[t]hrough its policy of accommodating their meetings, the University has created a forum generally open for use by student groups," noting that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum." *Id.* at 267 & n.5. In *Mergens*, the Court held that the Equal Access Act, 20 U.S.C. § 4071(b) prohibited a high school from "discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time." 110 S. Ct. at 2370. The high school had created a limited open forum by allowing noncurriculum-related student groups to use the school facilities. The denial of a request to form a Christian club, under the circumstances revealed, constituted a denial of equal access under the Equal Access Act.

Although appellants contend that our *Deeper Life* opinions are incompatible with these Supreme Court decisions and that the decisions compel a reversal of the district court in the case as bar, the contention is baseless. *Widmar* involved the use of university property by student groups

in a situation where a number of such groups had been afforded access, to the point where, as to the students, a "generally open forum" was created. 454 U.S. at 267. Similarly, in *Mergens*, the religious use of school property was sought by students, who have a greater claim on the use of school property than outsiders, especially when the property generally is open to student groups. The Supreme Court decided *Mergens* purely on statutory grounds, noting that it did not need to decide whether the First Amendment requires the same result. In the *Deeper Life* cases, as in the case at bar, we are presented with outside organizations seeking access where access has been limited and all religious use has been barred by policy and practice.

The appellants argue that denial of access somehow violated the Establishment Clause of the First Amendment as well as the Freedom of Speech Clause. It is difficult to see how this is so. If anything, a claim of a violation of the Free Exercise Clause would be expected. Nevertheless, there is no basis for any claim of First Amendment violation here. We have considered all of the arguments advanced by the appellants and find them meritless.

CONCLUSION

The judgment of the district court is affirmed in all respects.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 90-0500

(Wexler, J.)

LAMB'S CHAPEL and JOHN STEIGERWALD,

—against— *Plaintiffs,*

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE BOARD OF EDUCATION FOR CENTER MORICHES SCHOOLS,

Defendants.

APPEARANCES:

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MEMORANDUM AND ORDER

WEXLER, District Judge

Plaintiffs Lamb's Chapel and John Steigerwald ("Steigerwald") brought an action before this Court for declaratory and injunctive relief against the Center Moriches

Union Free School District ("School District") and Louise Tramontano, in her official capacity as President of the School District's Board of Education (the "Board"), because of defendants' refusal to allow plaintiffs to use the School District's facilities during nonschool hours for the purpose of showing a film series by Dr. James Dobson, entitled "Turn Your Heart Towards Home" (the "film series"). On May 16, 1990, this Court issued a Memorandum and Order denying plaintiffs' request for a preliminary injunction on the basis that plaintiffs did not show either a substantial likelihood of success on the merits or sufficiently serious questions going to the merits of their case. *Lamb's Chapel v. Center Moriches School Dist.*, 736 F.Supp. 1247, 1254 (E.D.N.Y. 1990).

Thereafter, Lamb's Chapel appealed that decision to the Second Circuit Court of Appeals. The appeal was withdrawn and the case has been returned to this Court at the suggestion of the staff Counsel for the Second Circuit for final disposition, and to afford this Court an opportunity to reconsider its denial of injunctive relief in light of *Board of Education of the Westside Community Schools v. Mergens*, 110 S.Ct. 2356 (1990). Currently before the Court are plaintiffs' motion for summary judgment and defendants' cross-motion for same, both pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. For the reasons stated below, defendants' motion is hereby granted and plaintiffs' motion is denied.

BACKGROUND

The undisputed facts, consisting of testimony and exhibits presented to the Court during the hearing on plaintiffs' motion for a preliminary injunction, are as follows:

Lamb's Chapel is an evangelical Christian church located in Center Moriches, New York, and incorporated under New York's Not-For-Profit Corporation Law; Steigerwald is its pastor. Since November of 1988, Steigerwald has submitted to defendants three applications on

behalf of Lamb's Chapel to use the School District's high school facilities.

The first application, dated November 19, 1988, stated that the purpose for which Lamb's Chapel sought to use the facilities was "to conduct Sunday a.m. service and Sunday School, Nursery, etc." Plaintiffs' Exhibit 5a [hereinafter Pl. Ex. #]. According to Steigerwald, this application was rejected because of the religious content of the film series that plaintiffs wished to show. Subsequently, by the second and third applications, dated December 16, 1988 and October 11, 1989, respectively, plaintiffs sought to use the high school auditorium for one evening for five consecutive weeks to show the film series. For purposes of this action, plaintiffs' conceded at the hearing that the film series is of a religious nature and the showing is for a religious purpose.[1]

Following an initial review of the December 16 application, by letter dated January 18, 1989, Alice Schoener ("Schoener"), the School District's business manager and district clerk wrote to Steigerwald on behalf of the Board to express the School District's concern that plaintiffs' use of the facilities appeared to be for a religious purpose. The letter indicated that the School District is

> bound by education law concerning the use of school facilities by religious organizations. Fortunately, we have not, to date, been put to the test of determining when a use of the facility by one of our local churches would constitute "religious purposes." I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations.
>
> The district has not, in the past, allowed the high school auditorium to be used by any group primarily for its own purposes.
>
> . . . .

[1] In this regard, the October 11 application notes that the film series is a "family oriented movie from a Christian perspective." Pl. Ex. 7a.

> If you care to pursue your request, please provide a more detailed description of your proposed use (including a brochure describing the film). . . . I will be happy to present your request to the Board of Education at our February meeting.

Pl. Ex. 6b. After receiving and reviewing the brochure, Schoener again wrote to Steigerwald on behalf of the Board, by letter dated February 8, 1989, rejecting the application because the film "appear[ed] to be church related." Pl. Ex. 6d. The third application, substantially similar to the second, was denied on the same basis.

According to defendants, the legal basis for refusing the requests was that the use of the facilities for religious purposes would violate § 414 of the New York Education Law[2] and Rule No. 7 of the School District's Rules and Regulations for Community Use of School Facilities ("Rule No. 7"),[3] which govern the use of school facilities.

Plaintiffs argue, however, that during 1987 and 1988 other organizations were allowed to use the school facilities, and that some did so for religious purposes.[4] In

[2] See Addendum.

[3] Rule No. 7 provides that "[t]he school premises shall not be used by any group for religious purposes." Pl. Ex. 5a. The Rules and Regulations further provide that groups requesting to use the school facilities must be composed predominantly of residents and/or students from the school community, although an exception is made for outside not-for-profit organizations, but only if the applicant demonstrates that there is a benefit to the school community. Rule No. 7.

[4] Plaintiffs list organizations which have been allowed to use the school facilities in the years 1987 and 1988:

> A New Age religious group known as the "Mind Center"
> Southern Harmonize Gospel Singers
> Salvation Army Youth Band
> Hampton Council of Churches' Billy Taylor Concert
> Center Moriches Co-op Nursery School's Quilting Bee

[Continued]

particular, plaintiffs point to performances by the Salvation Army Youth Band and the Southern Harmonize Gospel Singers, and a lecture series by the Mind Center, purportedly a New Age religious group.[5] Complaint at para. 18. Because of this practice, plaintiffs contend that they too should be allowed to use the school facilities for religious purposes. Plaintiffs argue that defendants have violated their first and fourteenth amendment rights of freedom of speech, freedom of association and free exercise of religion and their fourteenth amendment right to equal protection. Defendants contend that they may properly refuse to allow any group to use the facilities for religious purposes. In this respect, they maintain that they would not and did not knowingly allow any organization to use the school facilities for religious purposes. In addition, they argue that allowing plaintiffs to use the facilities for religious purposes would violate the Establishment Clause of the First Amendment, as well as § 414 of the New York Education Law and the School District's Rule No. 7.

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[4] [Continued]

Manorville Humane Society's Chinese Auction
Moriches Bay Power Squadron
Unkechaug Dance Group
Paul Gibson's Baseball Clinic
Moriches Bay Civic Association
Moriches Chamber of Commerce's Town Fair Day
Center Moriches Drama Club
Center Moriches Music Award Associations' "Amahl & the Night Visitors"
Saint John's Track and Field Program
Girl Scouts of Suffolk county
Cub Scouts Pack 23
Boy Scout Troop #414

(Plaintiffs' Brief in Support of Motion for Preliminary Injunction, at 7).

[5] The lecture series was sponsored by the Center Moriches Public Library. The series, entitled "Psychology and the Unknown," was on parapsychology and transpersonal psychology and dealt with eastern mysticism and metaphysics.

As previously stated, on May 16, 1990, this Court denied plaintiffs' motion for a preliminary injunction, finding that: (1) the School District, by enforcing restrictions on access imposed by state statute and by its own regulations, created a limited public forum; (2) as such, "'exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint-neutral to pass constitutional muster.'" *Lamb's Chapel*, 736 F.Supp. at 1251 (quoting *Deeper Life Christian Fellowship, Inc. v. Board of Educ. of the City of New York*, 852 F.2d 676, 679-80 (2d Cir. 1988) (citations omitted)); (3) plaintiffs had failed to demonstrate sufficiently that the School District had a practice of permitting use of school facilities by any organizations for religious purposes; and (4) there was no equal protection violation where the evidence showed that all organizations had been prohibited from using the school facilities for religious purposes. In short, this Court determined that "[t]he Constitution does not require a public school district to open its school buildings to indiscriminate use where the state has by policy and practice circumscribed availability through reasonable and viewpoint-neutral regulations." *Id.* at 1254.

DISCUSSION

A. Effect of *Mergens*

In 1990, the Supreme Court heard the case of *Board of Education of the Westside Community Schools v. Mergens*, 110 S.Ct. 2356 (1990). In *Mergens*, the Supreme Court was called upon to decide whether Westside High School (the "School" or "Westside") was prohibited by the Equal Access Act ("EAA" or the "Act"), 98 Stat. 1302, 20 U.S.C. §§ 4071-74, from "denying a *student religious group* permission to meet on school premises during noninstructional time, and if so, whether the Act, so construed, violates the Establishment Clause of the First Amendment." *Mergens*, 110 S.Ct. at 2362 (emphasis added).

The facts involved in *Mergens* are simple and differ substantially from the facts before this Court. In *Mergens*, a group of high school students brought suit against the School District after the School Board upheld Westside's denial of Mergens's request to organize, for the purpose of enabling voluntary student members to study the Bible and to pray together, a Christian Club having the same privileges and conditions as other student groups at Westside, with the exception that it would not have a faculty sponsor. The School, which is a public secondary school and which receives federal financial assistance, denied Mergens's request primarily on the basis that the formation of a religious club would violate the Establishment Clause.

Respondents, current and former Westside students, by and through their parents as next friends, brought an action in the United States District Court for the District of Nebraska seeking declaratory and injunctive relief. Respondents argued that the denial of Mergens's request to form the proposed club violated the EAA "which prohibits public secondary schools that receive federal assistance and that maintain a 'limited open forum' from denying 'equal access' to students who wish to meet within the forum on the basis of the content of the speech at such meetings." *Mergens*, 110 S.Ct. at 2363 (citing 20 U.S.C. § 4071(a)). Respondents also contended that the School Board's actions deprived them of their first and fourteenth amendment rights of freedom of speech, association, and the free exercise of religion.

The district court held for the petitioners on the basis that the Act did not apply to Westside because, the district court determined, all of Westside's student clubs were related to the School's curriculum and, hence, Westside had not created a "limited open forum." *Id.* The United States Court of Appeals for the Eighth Circuit reversed, holding that the district court was incorrect in determining that all of Westside's student clubs were

related to the curriculum. Rather, the Eighth Circuit concluded that because student clubs existed at the school which were noncurriculum related, Westside had created a "limited open forum" as defined by the Act and, therefore, "the Act applied to 'forbi[d] discrimination against [respondent's] proposed club on the basis of its religious content.'" *Id.* (quoting *Mergens v. Board of Educ. of Westside Community Schools*, 867 F.2d 1076, 1079 (8th Cir. 1989), *aff'd sub nom. Board of Educ. of Westside Community Schools v. Mergens*, 110 S.Ct. 2356 (1990)).

Under the EAA, a "limited open forum" exists when a public secondary school allows the opportunity for at least one noncurriculum related student group to meet on school grounds during noninstructional hours. 20 U.S.C. § 4071(b). After a lengthy discussion about the meaning of the term "noncurriculum related student group," the *Mergens* Court defined the term to include "any student group that does not *directly* relate to the body of courses offered by the school." *Mergens*, 110 S.Ct. at 2366 (emphasis in original). The Court noted that a student group is directly related to a school's curriculum if the subject matter of the group is currently taught, will be taught soon, is required by school, or if academic credit is given for participation in the group in question. *Id.*

The Supreme Court affirmed the court of appeals and held that because Westside had created a "limited open forum" the denial of the request to form a Christian club constituted a denial of "equal access" under the EAA. *Id.* at 2370. The Court found that by enacting the EAA in 1984, Congress extended the holding of *Widmar v. Vincent*, 454 U.S. 263 (1981), to public secondary schools. In *Widmar*, the Supreme Court determined that a state university regulation that prohibited students from using university facilities for religious purposes was invalid on free speech grounds. *Widmar*, 454 U.S. at 263. The Supreme Court held that an "'equal access' policy would not violate the Establishment Clause," *id*, at 271-74, un-

der the three-prong test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).[6]

Relying on its definition of "noncurriculum related student groups," the *Mergens* Court affirmed the Eighth Circuit's finding that one or more of such groups existed at Westside and, therefore, Westside had created a "limited open forum" under the Act. 110 S.Ct. at 2368-70. Accordingly, the Court determined that the Act prohibited Westside from "discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time." *Id.* at 2370.

The Supreme Court found no merit in petitioners' argument that the Court's interpretation of the EAA wrested control of school affairs from local school boards. The Court reasoned that school districts could sidestep the EAA by "choos[ing] to structure its course offerings to avoid the Act's obligations . . . ." *Id.* at 2367. Further, the Supreme Court noted that, under the Act, schools remain free to "prohibit meetings that would 'materially and substantially interfere with the orderly conduct of educational activities within the school.'" *Id.* (quoting 20 U.S.C. § 4071(c)(2) (additional citation omitted)). Lastly, the Court pointed out that school districts that wished to avoid the Act's mandates could do so by refusing federal funding. *Id.*

The Supreme Court concluded that the School's refusal to allow respondents to form a Christian club denied them "equal access" under the EAA. *Id.* at 2370. It is significant that the Supreme Court decided solely on statutory grounds. In fact, the Court stated, "[W]e need not decide—and therefore express no opinion on—whether the First Amendment requires the same result." *Id.*

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[6] Under this three-prong test, a governmental policy will not offend the Establishment Clause if: (1) it has a secular purpose; (2) its principal or primary effect is one that neither advances nor inhibits religion; and (3) it does not foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13.

The Court addressed the issue of whether the Act, as interpreted, "violates the Establishment Clause of the First Amendment, as applied to the States through the Fourteenth Amendment." *Id.* Underlying this issue was petitioner's argument that officially sanctioning the proposed club would, in effect, result in a violation of the Establishment Clause. The Supreme Court disagreed. Applying the logic of *Widmar*, where the Court found that a policy allowing equal access to university facilities to religious groups did not violate the Establishment Clause, 454 U.S. at 271-75, a plurality of the *Mergens* Court concluded that the EAA was capable of withstanding the constitutional rigors of *Lemon*. *Id.* at 2371 (plurality opinion). Justices O'Connor, White, and Blackmun grounded their determination on the fact that the Act not only prohibited discrimination of religious speech but also of "political, philosophical or other" speech. Accordingly, they attributed a secular purpose to the Act. *Id.* (citations omitted).

Likewise, they found that the Act did not have the primary effect of advancing religion and proffered three grounds on which to rest their conclusion. First, Justice O'Connor stated that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, with the Free Speech and Free Exercises Clauses protect." *Id.* at 2372 (plurality) (emphasis in original) (reasoning that high school students were sufficiently capable of understanding the difference between a school's "endorsing student speech" and "merely permit[ting]" it). Second, support was found in the terms of the Act itself which require meetings to be held when classes are not in progress, 20 U.S.C. § 4071(b), and which restricts school officials from participating at the meetings of student religious groups. 20 U.S.C. § 4071(c). Third, O'Connor determined that, given the vast array of officially sanctioned student groups, the fear of "official endorsement of or preference for religion or a

particular religious belief" was unfounded. *Id.* at 2372-73.

Finally, Justice O'Connor found that compliance with the Act did not create a possibility of excessive entanglement between government and religion. The plurality looked to the boundaries of the Act itself which prohibit school "sponsorship" of religious clubs, 20 U.S.C. § 4071 (c) (2), and which, for example, forbid faculty members from participating in any such meetings. 20 U.S.C. § 4071(c) (3) (although a faculty member may be assigned for "custodial purposes").

As noted, the case at bar was returned to this Court at the suggestion of the Second Circuit's Staff Counsel because of the Supreme Court's decision in *Mergens*. Plaintiffs argue that "*Mergens* obviously changes the constitutional landscape as far as equal access for religious speech on public school grounds goes." Plaintiff's Supplementary Memorandum in Support of Motion for Summary Judgment at 10. Plaintiffs ask this Court to apply the reasoning of *Mergens* to the facts before this Court. In contrast, defendants contend that *Mergens* is without effect on this case because the Supreme Court's decision rested entirely on the EAA. Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment at 2. Defendants correctly observe that the question to be decided by this Court, post-*Mergens*, "is not whether the school district *may*, under circumstances where its policy, practice or state law otherwise provide for such access, open its forum to religious use, but whether it *must* open its forum to such use in the face of a policy, practice and in New York a state legislative enactment (§ 414 [of the] Education Law) which specifically prohibits such use." *Id.* at 4 (emphasis in original). This Court finds no such mandate in the *Mergens* decision.

Plaintiffs again put forth the argument that the School District has created an open forum by policy and

practice. This Court previously determined that "by enforcing restrictions on access imposed by state statute and by its regulations, the School District has created limited public forums." *Lamb's Chapel*, 736 F.Supp. at 1251. In so finding, the Court specifically rejected plaintiffs' argument that defendants created an "open forum" merely by allowing groups unrelated to the School District to meet on school district premises. Specifically, the Court ruled that the School District "has not by policy or practice either opened its facilities to indiscriminate use by the general public or some segment of the public." *Id.*

This is noteworthy because of the Supreme Court's discussion in *Mergens* about the importance of the distinction between the two designations. The Supreme Court pointed out that the EAA is specifically limited to schools that maintain a "limited open forum." *Mergens*, 110 S.Ct. at 2363 (citing 20 U.S.C. § 4071(a)). In fact, the Court stated that:

> [T]he Act itself neither uses the phrase "limited public forum" nor so much as hints that the doctrine is somehow "incorporated" into the words of the statute. The operative language of the statute, 20 U.S.C. § 4071(a), of course, refers to a "limited open forum," a term that is specifically defined in the next subsection, § 4071(b). Congress was presumably aware that "limited public forum," as used by the Court, is a term of art . . . and had it intended to import that concept into the Act, one would suppose that it would have done so explicitly. Indeed, Congress' deliberate choice to use a different term—and to define that term—can only mean that it intended to establish a standard different from the one established by our free speech cases.

Id. at 2367-68 (citations omitted).

The significance of the Supreme Court's language rests in its application of the EAA to the Court's determina-

tion that petitioners were in violation of the Act. The situation before this Court is readily distinguishable where defendants have created a limited public form to which the Act does not apply.

Moreover, nothing in plaintiffs' argument convinces this Court to stretch the holding in *Mergens* to accommodate the facts before this Court. In *Mergens*, the Supreme Court adopted the logic of *Widmar*. Underlying that reasoning was the *Widmar* Court's decision to limit the holding to "persons *entitled* to be [on the campuses of State universities]." *Widmar*, 454 U.S. at 268 (emphasis added). Likewise, *Mergens* is distinguishable from the present case in that *Mergens*, like *Widmar*, is addressed to students "entitled" to be on school premises.

This Court is presented with a very different scenario. Plaintiffs, who are *not* students, are seeking to use school facilities during nonschool hours. The Second Circuit has specifically held that, at least in New York, public schools "are not, as to the general community, traditional public fora." *Deeper Life*, 852 F.2d at 679 (citations omitted). As noted, under circumstances where a school district creates a "limited public forum," as is the situation here, "property remains a nonpublic forum as to all unspecified uses, . . . and exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint-neutral to pass constitutional muster." *Deeper Life*, 852 F.2d at 679-80. Nothing the School District has done, by its policy or its practice, belies this standard.

Significantly, after the Supreme Court rendered its decision in *Mergens*, the Second Circuit decided the case of *Travis v. Owego-Appalachin School District*, 927 F.2d 688 (2d Cir. 1991), a case involving the same issue as the one before this Court.[7] In *Travis*, the Second Circuit

[7] The Court notes that the Second Circuit cites *Mergens* only for the proposition that an open-door policy that "allow[s] religious speech does not 'endorse' or 'establish' a religion." *Travis*, 927 F.2d at 694 (citing *Mergens*, 110 S.Ct. at 2370-73, 2377-78) (plurality and concurring opinions) (additional citation omitted)).

ruled that a school district's denial of plaintiff Birthright of Owego, Inc.'s application to use the school district's facilities for the purpose of a fundraiser involving "religious and/or political activity" constituted a violation of the Free Speech and Establishment Clauses. 927 F.2d at 694. The *Travis* court, which found that defendants had created a limited public forum, based its conclusion on the school district's past practice which included permitting school facilities to be used for a religious Christmas program. As such, defendant's selective denial of Birthright's application was not viewpoint-neutral and, therefore, was unconstitutional. *Id.* at 692-94. In contrast, this Court ruled that the Center Moriches School District's past practice has prohibited such use in all cases.

However, this Court finds the most compelling support for its decision in the language of *Mergens* itself which states, "[b]ecause we rest our conclusion on statutory grounds, we need not decide—and therefore express no opinion on—whether the First Amendment requires the same result." *Mergens*, 110 S.Ct. at 2370. As defendants accurately assert, the *Mergens* decision rested on an act of Congress, permitting secondary school students to conduct religious activities on school premises. Neither Congress nor the Supreme Court has seen fit to require a school district to open its doors to nonstudents who wish to use school facilities for the purpose of conducting religious activities within a school. Therefore, this Court finds that if the intended use of school facilities is not required or authorized by statute, there is no constitutional right to such use where a school district has not, by policy or practice, permitted a similar use in the past. *See Mergens*, 110 S.Ct. at 2370; *Travis*, 927 F.2d at 692.

B. *Summary Judgment*

A motion for summary judgment may be granted only when "there is no genuine issue as to any material fact and [ ] the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir. 1987). The burden is on the moving party to clearly establish the absence of a genuine issue as to any material fact. *Donahue*, 834 F.2d at 57. In addition, the district court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). However, the moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings . . . [but] must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The Court notes that an unresolved factual issue is one that a reasonable fact finder could decide in favor of either party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Currently, both parties move for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Having found that *Mergens* is not controlling, the Court turns to address these motions.

The parties agree that the case is to be decided on the basis of the undisputed facts which consist of testimony and exhibits presented to the Court during the hearing on the motion for a preliminary injunction. In this Court's May 16, 1990 decision, the Court determined that "plaintiffs have not sufficiently shown that defendants have a practice of permitting use by any organization for religious purposes." *Lamb's Chapel*, 736 F.Supp. at 1253. In the absence of such a finding, summary judgment is appropriate. *See Travis*, 927 F.2d at 692. As both the Supreme Court and the Second Circuit have noted, "[t]he First Amendment . . . does not guarantee

unlimited access to government-owned property for purposes of expression. Government may thus properly regulate such access depending on the nature of the property at issue." *Id.* at 691 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985)).

Based on the record, this Court determined that the School District's facilities are "limited public forums." *Lamb's Chapel*, 736 F.Supp. at 1252. The Court based its determination, in part, on the fact that, while § 414 of the New York Education Law enumerates nine purposes for which public school facilities may be used by the general public, nowhere does it include religious worship or instruction. *See* § 414; *Deeper Life*, 852 F.2d at 680 (stating that critical to determining whether the state has created a limited public forum is the state's intent in establishing the forum). Moreover, Rule No. 7 explicitly proscribes using school facilities for religious purposes, which this Court considers a strong indication of an intent to limit the availability of such property.

In a case directly on point, the Second Circuit stated that "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech. . . ." *Travis*, 927 F.2d at 692. However, the Second Circuit cautioned that once a limited public forum is opened to a particular type of speech, "selectively deny[ing] access for other activities of th[e] same genre" is forbidden. *Id.*

In the case at bar, this Court specifically determined that plaintiffs have not presented sufficient evidence to create a fair ground for litigation as to whether the School District has by practice allowed organizations of similar character to Lamb's Chapel to use its facilities for religious purposes. Moreover, nothing in plaintiff's moving papers persuades the Court to decide otherwise. Because the School District has not, by policy or practice,

opened its doors to groups akin to Lamb's Chapel, this Court holds that the School District's denial of plaintiffs' applications to show the film series is viewpoint-neutral and, hence, constitutional. *See id.* at 694.

CONCLUSION

The Court, having found that no genuine issue exists to be decided at trial, grants defendants' motion for summary judgment. Accordingly, plaintiffs' motion is denied. The Clerk of the Court is directed to close the file in this case.

SO ORDERED.

/s/ Leonard D. Wexler
LEONARD D. WEXLER
United States District Judge

Dated: Hauppauge, New York
July 15, 1991

Addendum

Section 414 of the New York Education Law provides in pertinent part:

> 1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes, or when the school is in use for school purposes . . . for such other public purposes as are herein provided . . .:
>
> (a) For the purpose of instruction in any branch of education, learning or the arts.
>
> (b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.
>
> (c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.
>
> (d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United

States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings.

(f) For civic forums and community centers.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours . . . .

N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 1991).

APPENDIX C

UNITED STATES DISTRICT COURT
E.D. NEW YORK

No. CV 90-0500

LAMB'S CHAPEL and JOHN STEIGERWALD,
Plaintiffs,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO in her Official Capacity as President of the Board of Education for Center Moriches Schools,
Defendants.

May 16, 1990

Migliore & Infranco by Joseph P. Infranco, Commack, N.Y., for plaintiffs.

Dranitzke, Lechtrecker & Trabold by Harold G. Trabold, Patchogue, N.Y., for defendants.

Cynthia Plumb Fletcher, Albany, N.Y., for New York State School Boards Ass'n (amicus).

MEMORANDUM AND ORDER

WEXLER, District Judge.

Plaintiffs Lamb's Chapel and John Steigerwald ("Steigerwald") bring this action for declaratory and injunctive relief against the Center Moriches Union Free School District ("School District") and Louise Tramontano, in her

official capacity as President of the School District's Board of Education (the "Board"), because of defendants' refusal to allow plaintiffs to use the School District's facilities during nonschool hours for the purpose of showing a film series by Dr. James Dobson, entitled "Turn Your Heart Toward Home" (the "film series"). Presently before the Court is plaintiffs' motion for a preliminary injunction to compel defendants to allow plaintiffs to show the film series in the School District's facilities. For the reasons below, the motion is denied.

I. BACKGROUND

The facts as alleged in the complaint and as adduced at the hearing on plaintiffs' motion on March 14, 1990 are as follows: Lamb's Chapel is an evangelical Christian church located in Center Moriches, New York, and incorporated under New York's Not-for-Profit Corporation Law; Steigerwald is its pastor. Since November 1988, on behalf of Lamb's Chapel, Steigerwald has submitted three applications to defendants to use the School District's high school facilities.

The first application, dated November 19, 1988, stated that the purpose for which Lamb's Chapel sought to use the facilities was "to conduct Sunday a.m. service and Sunday School, Nursery, etc." Plaintiff's Exhibit 5a [hereinafter Pl.Ex. #]. According to Steigerwald, this application was rejected because of the religious content of the film series. Subsequently, by the second and third applications, dated December 16, 1988 and October 11, 1989, respectively, plaintiffs sought to use the high school auditorium for one evening for five consecutive weeks to show the film series. For purposes of this action, plaintiffs' conceded at the hearing that the film series is of a religious nature and the showing is for a religious purpose.[1]

[1] In this regard, the October 11 application notes that the film series is a "family oriented movie from a Christian perspective." Pl.Ex. 7a.

Following an initial review of the December 16 application, by letter dated January 18, 1989, Alice Schoener ("Schoener"), the School District's business manager and district clerk, on behalf of the Board, wrote Steigerwald to express the School District's concern that plaintiffs' use of the facilities appeared to be for a religious purpose. The letter indicated that the School District is

> bound by education law concerning the use of school facilities by religious organizations. Fortunately, we have not, to date, been put to the test of determining when a use of the facility by one of our local churches would constitute "religious purposes." I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations.
>
> The district has not, in the past, allowed the high school auditorium to be used by any group primarily for its own purposes . . . .
>
> If you care to pursue your request, please provide a more detailed description of your proposed use (including a brochure describing the film). . . . I will be happy to present your request to the Board of Education at our February meeting.

Pl.Ex. 6b. After receiving and reviewing the brochure, Schoener again wrote Steigerwald on behalf of the Board, by letter dated February 8, 1989, to reject the application because the film "appear[ed] to be church related." Pl.Ex. 6d. The third application, substantially similar to the second, was denied on the same basis.

According to defendants, the legal basis for refusing the requests was that use of the facilities for religious purposes would violate § 414 of the New York Education Law[2] and Rule No. 7 of the School District's Rules and

[2] *See* Addendum.

Regulations for Community Use of School Facilities,[3] which govern the use of its facilities.

Plaintiffs argue, however, that during 1987 and 1988 other organizations had been allowed to use the school facilities, and that some had done so for religious purposes.[4] In particular, plaintiffs point to performances by the Salvation Army Youth Band and the Southern Harmonize Gospel Singers, and a lecture series by the Mind Center, purportedly, a New Age religious group.[5] Com-

[3] Rule No. 7 provides that "[t]he school premises shall not be used by any group for religious purposes." Pl.Ex. 5a. The Rules and Regulations further provide that groups requesting to use the school facilities must be predominantly composed of residents and/or students from the school community, though exception is made for outside not-for-profit organizations but only if the applicant demonstrates that there is a benefit to the school community. *Id.*

[4] Plaintiffs list organizations which have been allowed to use the school facilities in the years 1987 and 1988:

A New Age religious group known as the "Mind Center"
Southern Harmonize Gospel Singers
Salvation Army Youth Band
Hampton Council of Churches' Billy Taylor Concert
Center Moriches Co-op Nursery School's Quilting Bee
Manorville Humane Society's Chinese Auction
Moriches Bay Power Squadron
Unkechaug Dance Group
Paul Gibson's Baseball Clinic
Moriches Bay Civic Association
Moriches Chamber of Commerce's Town Fair Day
Center Moriches Drama Club
Center Moriches Music Award Associations' "Amahl & the Night Visitors"
Saint John's Track and Field Program
Girl Scouts of Suffolk County
Cub Scouts Pack 23
Boy Scout Troop #414

Plaintiffs' Brief in Support of Motion for Preliminary Injunction, at 7.

[5] The lecture series was sponsored by the Center Moriches Public Library. The series, entitled "Psychology and the Unknown," was on parapsychology and transpersonal psychology and dealt with eastern mysticism and metaphysics.

plaint para. 18. Because of this practice, plaintiffs contend that they too should be allowed to use the school facilities for religious purposes. Plaintiffs argue that defendants have violated their first and fourteenth amendment rights of freedom of speech, freedom of association and free exercise of religion and their fourteenth amendment right to equal protection. Defendants contend that they may properly refuse to allow any group to use the facilities for religious purposes. In this respect, they maintain that they would not and did not knowingly allow any organization to use the school facilities for religious purposes. In addition, they argue that allowing plaintiffs to use the facilities for religious purposes would violate the Establishment Clause of the first amendment, as well as N.Y.Educ.Law § 414 and the School District's Rule No. 7.

II. DISCUSSION

A. *Preliminary Injunction Standard*

In the Second Circuit, to obtain a preliminary injunction the moving party must show: "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir.1988) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir.1979) (per curiam)). The Court therefore turns to evaluate plaintiffs' request under this standard.

B. *Irreparable Harm*

Regarding irreparable harm, plaintiffs contend that denial of the preliminary injunction to use the facilities to show the film series would cause them irreparable harm. This Court agrees. As the Supreme Court has stated, "loss

of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976); *see also Deeper Life*, 852 F.2d at 679. Accordingly, the Court finds that plaintiffs have demonstrated irreparable harm, and therefore moves on to assess the merits to determine whether plaintiffs have met the second part of the preliminary injunction standard.

C. *The Merits*

As for the second part of the standard, plaintiffs contend that defendants created an "open forum" by allowing a "wide assortment" of groups to use the school facilities, including three groups that used the facilities for "meetings and performances with particular religious messages." Complaint para. 18. As a result, they claim that "this forum cannot be closed to others based on the religious content of their message." *Id.* In opposing the motion, defendants contend that the state, through § 414 and the School District's Rule No. 7, has limited outside organizations' access to the School District's facilities by creating only a "limited public forum," and may legitimately deny access to any group seeking to use the school's facilities for proscribed purposes. As discussed below, this Court finds that plaintiffs have failed to satisfy the second part of the standard.

The Supreme Court has identified three types of forums for purposes of free speech analysis: (1) the traditional public forum; (2) the public forum created by government designation; and (3) the nonpublic forum. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 572, 107 S.Ct. 2568, 2570-71, 96 L.Ed.2d 500 (1987) (citing *Perry Educ. Ass'n v. Perry Local Educs.' Ass'n*, 460 U.S. 37, 45-46, 103 S.Ct. 948, 954-56, 74 L.Ed.2d 794 (1983)). Historically, streets and parks have been categorized as traditional public forums. *Perry Educ. Ass'n v.*

Perry Local Educs.' Ass'n, 460 U.S. 37, 45, 103 S.Ct, 948 954-55, 74 L.Ed.2d 794 (1983) (citing *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963-64, 83 L.Ed.2d 1423 (1939)). In contrast, "[w]hile the citizenry residing within a school district may be the intended users of the forum . . ., public elementary schools are not, as to the general community, traditional public fora." *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 679 (2d. Cir.1988) (citing *Brandon v. Board of Educ.*, 635 F.2d 971, 980 (2d Cir.1980), *cert. denied*, 454 U.S. 1123, 102 S.Ct. 970, 71 L.Ed.2d 109 (1981)). Nor are the public secondary schools, like the School District's here, traditional public forums. *See Brandon v. Board of Educ.*, 635 F.2d 971, 980 (2d Cir.1980), *cert. denied*, 454 U.S. 1123, 102 S.Ct. 970, 71 L.Ed.2d 109 (1981).

As for whether public school facilities are public forums, the Supreme Court has held that

> school facilities may be deemed to be public forums only if school authorities have "by policy or practice" opened those facilities for "indiscriminate use by the general public," *Perry Education Assn v. Perry Local Educators' Assn*, 460 U.S. 37, 47 [103 S.Ct. 948, 956, 74 L.Ed.2d 194] (1983), or by some segment of the public, such as student organizations. *Id.*, at 46, n. 7 [103 S.Ct., at 955, n. 7] (citing *Widmar v. Vincent* [, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981)]).

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267, 108 S.Ct. 562, 567-68, 98 L.Ed.2d 592 (1988); *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3448-49, 87 L.Ed.2d 567 (1985) ("The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."). Based on the record, this Court finds that the School District has not by policy or practice either opened its facilities to indiscriminate use by the

general public or some segment of the public. The school facilities are therefore not public forums. Rather, by enforcing restrictions on access imposed by state statute and by its regulations, the School District has created limited public forums.

Plaintiffs' argument that the defendants have created an "open forum" merely by allowing groups unrelated to the School District to meet there is without merit. The School District has not allowed so-called "unrelated" groups to use its facilities indiscriminately. Instead, the School District has restricted use based on the purpose for which the particular group seeks to use the property. Consequently, an "unrelated" group can use the facilities for a prescribed purpose but not otherwise.

The right to access government property and the standard for evaluating any restrictions varies according to the type of forum involved. *Calash v. City of Bridgeport*, 788 F.2d 80, 83 (2d Cir.1986). In either a traditional public forum or a public forum by government designation, the state may restrict access only by reasonable time, place, and manner regulations which are content-neutral or by content-based prohibitions, narrowly drawn to effectuate a compelling state interest, *Perry Educ. Ass'n*, 460 U.S. at 45-46, 103 S.Ct. at 954-56, whereas in a nonpublic forum, access can be restricted by reasonable and viewpoint-neutral regulations, *Jews for Jesus, Inc.*, 482 U.S. at 573, 107 S.Ct. at 2571; *Cornelius*, 473 U.S. at 806, 105 S.Ct. at 3451; *Perry Educ. Ass'n*, 460 U.S. at 49, 103 S.Ct. at 957. As for restricting access in a limited public forum, the Second Circuit explained in *Deeper Life:* "Under the limited public forum analysis, property remains a *nonpublic forum* as to all unspecified uses, and exclusion of uses—even if based upon subject matter or the speaker's identity—need only be reasonable and viewpoint-neutral to pass constitutional muster." *Deeper Life*, 852 F.2d at 679-80 (citations omitted) (emphasis added).

In *Deeper Life*, the Second Circuit reviewed a district court's grant of a preliminary injunction requiring the New York City Board of Education ("NYCBE") to permit a church to conduct religious services in a public school building during non-school hours notwithstanding the provisions of § 414 and a NYCBE regulation excluding fundraising for, teaching the tenets of, or distributing material promoting a particular religion. The Second Circuit stated that critical to determining whether the state has created a limited public forum is the state's interest in establishing the forum. *Id.* at 680 (citing *Calash*, 788 F.2d at 83). With respect to the state's intent, the court noted that under § 414 public school facilities may be used by the general public only for nine enumerated purposes and that use for religious worship and instruction is not one of those purposes. *Id.* (citing *Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912, 915 (4th Dep't 1978)). The court also noted that local school board regulations—such as the NYCBE regulation—are indicative of the state's intent and that such regulations may limit the availability of the forum. *Id.* Lastly, the court noted that § 414 and the New York State Commissioner of Education's interpretations of the statute "demonstrate . . . that access to the school propetry is permitted only where it serves the interests of the public in general, rather than that of sectarian groups," and that "the thrust of the statute is to promote general knowledge, rather than to provide a forum for proselytizing or indoctrinating the public in a particular group's beliefs." *Id.* Notwithstanding that the church was seeking to use the school premises for a purpose arguably outside § 414, the court affirmed the grant of the preliminary injunction because the record showed that the NYCBE had a practice of granting use permits to other religious organizations, thereby creating a fair ground for litigation as to the state's intent in creating the forum. *Id.* at 680-81.

As for the state's intent in creating the forum at issue, as noted in *Deeper Life*, while § 414 lists allowable uses of public school facilities, nowhere does it provide for religious worship or instruction. *Id.* at 680. Moreover, the School District's Rule No. 7, explicitly precluding use of the school facilities for religious purposes, is a strong indication of the state's intent to limit the availability of this particular forum. *See id.* The statute and regulations clearly indicate the state's intent to selectively limit access to the School District's facilities. Based on the record, this Court finds that the School District's facilities are limited public forums. Hence, as to those who would use the facilities for proscribed purposes, in this instance, religious purposes, they are nonpublic forums; and, as such, any exclusion of use must be reasonable and viewpoint-neutral to pass constitutional muster. Accordingly, for plaintiffs to succeed they "must establish that New York's access policy has created a limited public forum intended to benefit" organizations such as Lamb's Chapel and "encompassing the purposes for which the organization seeks to use the school property." *Id.*

Plaintiffs, however, argue that their rights of free speech and association entitle them to access this forum for the purpose they desire. They contend that by creating an "open forum," *i.e.*, a public forum, the School District cannot place content-based restrictions on its use unless the regulations are narrowly drawn to effectuate a compelling state interest. However, as noted above, the evidence indicates that the school facilities are not public forums but rather limited public forums where access can be restricted by reasonable viewpoint-neutral regulations. The focus is not, as plaintiffs argue, on whether defendants have drawn a distinction between religious speech and nonreligious speech, but on whether the exclusion of use based on the purpose for which the group seeks to use the property is reasonable and viewpoint-neutral. Plaintiffs' argument is therefore misplaced.

Further, plaintiffs contend that "Schoener's sole discretion in determining what is or is not overly religious and therefore permissible or not permissible speech, constitutes unconstitutional unbridled discretion on the part of a government official." Complaint para. 22. The plaintiffs, however, did not produce evidence that Schoener made any such determinations. Indeed, Schoener testified that she did not and does not determine if a use would constitute a "religious purpose," and, her letter of January 18, 1989 to Steigerwald indicates no more than that she sought, on behalf of the Board, more information for the Board's determination. Plaintiffs offer no evidence calling into question the reasonableness or propriety of the School District's application review process.

Plaintiffs have not presented sufficient evidence to create a fair ground for litigation as to whether the School District has by practice allowed organizations of similar character to Lamb's Chapel, or, for that matter, any organizations, to use its facilities for religious purposes, thereby opening this forum to plaintiffs. Evidence offered on this point included proof that the Salvation Army Youth Band performed "God Bless America,"[6] Pl.Exs. 11a, 24, and that the Southern Harmonize Gospel Singers sang gospel music, including the song "Amazing Grace." Pl.Exs. 12a, 12b. There was also proof that the Family Counseling Service ("FCS"), affiliated with the Hampton Council of Churches, sponsored a concert by Billy Taylor. Pl.Exs. 9a, 9b. The Director of Development of the FCS, Ruth Bragarnick, testified that the FCS is a partially government-funded, non-profit, non-sectarian organization, and that the concert was to raise funds for counseling services offered by the FCS to communities on eastern

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[6] The performance was part of a joint concert with the Center Moriches High School Band to raise money for a scholarship for a school band member and for sending a needy child to summer camp. The performance of "God Bless America" was, in fact, performed by the combined bands. Pl.Ex. 24.

Long Island. In addition, plaintiffs offered testimony that the lecturer on parapsychology from the Mind Center, Jerry Huck ("Huck"), discussed, among other things, spiritual growth, channeling, out-of-body experiences, and kundalini and the centers of the body, and referred to God and Jesus Christ at some point in his lecture. Huck, however, testified that his lectures involved scientific topics only, based on such things as analytic and quantum physics. And the application submitted by the Center Moriches Public Library for the lecture series specified that the purpose of the lectures was "Educational." Pl. Ex. 16. Upon review of the record, this Court finds that plaintiffs have not sufficiently shown that defendants have a practice of permitting use by any organization for religious purposes.

Plaintiffs also argue that defendants have violated their rights to equal protection by imposing a content-based restriction in a public forum. Plaintiffs contend that strict scrutiny analysis should be applied since defendants base the exclusion on a suspect classification (religion), infringing on fundamental rights (freedom of speech, freedom of association, and free exercise of religion). This argument is without merit for two reasons. First, as noted above, the school facilities are not public forums. And second, more importantly, as noted above, the evidence shows that all organizations have been equally prohibited from using the facilities for religious purposes. *See Brandon*, 635 F.2d at 980 ("[S]ince all religious groups are equally denied access, any equal protection argument lacks merit.")

It is also clear that plaintiffs cannot base their right to access on their constitutional right to free exercise of religion since this is neither a situation where the state has asserted coercive restraints on religious observation nor a situation where special circumstances require the state to accommodate the plaintiffs' religious needs. *See id.* at 976-78.

Nor can plaintiffs base their right to access on the Supreme Court's decision in *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), and the Establishment Clause. Plaintiffs argue that religious use of the School District's open forum is required by *Widmar*, and that the Establishment Clause does not justify banning religious speakers from an open forum under the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971),[7] because the "School District's policy and actions have the 'primary effect' of advancing nonreligion and inhibiting religion," and the "government does not show neutrality towards religion with its hostile act of banning all religious expression from an open forum." Brief in Support of Plaintiffs' Motion for a Preliminary Injunction, at 12-15, 22-23. This Court does not agree with either argument. Again, plaintiffs premise their arguments on their mistaken view that the school facilities are public forums as defined by the Supreme Court in *Hazelwood School District*, *supra*. Further, plaintiffs ignore the Second Circuit's view that *Widmar* does not control in this type of situation.[8]

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[7] Under this three-prong test, a governmental policy will not offend the Establishment Clause if: (1) it has a secular purpose; (2) its principal or primary effect is one that neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111.

[8] In *Deeper Life* the Second Circuit stated:

> *Widmar*, however, does not control the result here. As the Supreme Court pointed out in a later case, in *Widmar* it had "noted that a university campus, at least as to its students, possesses many of the characteristics of a traditional public forum," thereby subjecting attempts at regulating use to the most exacting constitutional standards as to the forum's intended beneficiaries.

Deeper Life, 852 F.2d at 679 (quoting *Cornelius*, 473 U.S. at 803, 105 S.Ct. at 3449-50). The court instead chose to apply what it termed a "limited public forum analysis," as discussed previously.

The Constitution does not require a public school district to open its school buildings to indiscriminate use where the state has by policy and practice circumscribed availability through reasonable and viewpoint-neutral regulations. Plaintiffs have not sufficiently shown that the situation is otherwise so as to justify the preliminary injunction.

CONCLUSION

Based on the reasons above, since plaintiffs have not shown either a substantial likelihood of success on the merits or sufficiently serious questions going to the merits, their request for a preliminary injunction is denied.

SO ORDERED.

ADDENDUM

New York Education Law § 414 provides in pertinent part:

> 1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. . . . Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:
>
> (a) For the purpose of instruction in any branch of education, learning or the arts.
>
> (b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.
>
> (c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public.
>
> (d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be extended for an educational or

charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civil [sic] forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for the conduct and supervision, provided that nothing herein contained

shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during nonschool hours, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

N.Y.Educ.Law § 414 (McKinney 1988 & Supp.1990).

APPENDIX D

N.Y. Educ. Law § 414

(McKinney 1988 & Supp. 1992)

§ 414. Use of schoolhouse and grounds

1. Schoolhouses and the grounds connected therewith and all property belonging to the district shall be in the custody and under the control and supervision of the trustees or board of education of the district. The trustees or board of education may adopt reasonable regulations for the use of such schoolhouses, grounds or other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for such other public purposes as are herein provided; except, however, in the city of New York each community school board shall be authorized to prohibit any use of schoolhouses and school grounds within its district which would otherwise be permitted under the provisions of this section. Such regulations shall provide for the safety and security of the pupils and shall not conflict with the provisions of this chapter and shall conform to the purposes and intent of this section and shall be subject to review on appeal to the commissioner of education as provided by law. The trustees or board of education of each district may, subject to regulations adopted as above provided, permit the use of the schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the trustees or board of education use will not be disruptive of normal school operations, for any of the following purposes:

(a) For the purpose of instruction in any branch of education, learning or the arts.

(b) For public library purposes, subject to the provisions of this chapter, or as stations of public libraries.

(c) For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and open to the general public.

(d) For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret, or exclusive society or organization other than organizations of veterans of the military, naval and marine service of the United States and organizations of volunteer firefighters or volunteer ambulance workers.

(e) For polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof. Except in cities, it shall be the duty of the trustees or board of education to call a special meeting for such purpose upon the petition of at least ten per centum of the qualified electors of the district. Authority so granted shall continue until revoked in like manner and by the same body as granted.

(f) For civic forums and community centers. Upon the petition of at least twenty-five citizens residing within the district or city, the trustees or board of education in each school district or city shall organize and conduct community centers for civic purposes, and civic forums in the several school districts and cities, to promote and advance

principles of Americanism among the residents of the state. The trustees or board of education in each school district or city, when organizing such community centers or civil forums, shall provide funds for the maintenance and support of such community centers and civic forums, and shall prescribe regulations for their conduct and supervision, provided that nothing herein contained shall prohibit the trustees of such school district or the board of education to prescribe and adopt rules and regulations to make such community centers or civic forums self-supporting as far as practicable. Such community centers and civic forums shall be at all times under the control of the trustees or board of education in each school district or city, and shall be non-exclusive and open to the general public.

(g) For classes of instruction for mentally retarded minors operated by a private organization approved by the commissioner of education.

(h) For recreation, physical training and athletics, including competitive athletic contests of children attending a private, nonprofit school.

(i) To provide child care services during non-school hours, provided that the cost of such care shall not be a school district charge but shall be paid by the person responsible for the support of such child; the local social services district as authorized by law; or by any other public or private voluntary source or any combination thereof.

(j) For graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

The board of education in the city of New York may delegate the authority to judge the appropriateness for uses other than school purposes to community school boards.

2. The trustees or board of education shall determine the terms and conditions for such use which may include rental at least in an amount sufficient to cover all resulting expenses for the purposes of paragraphs (a), (b), (c), (d), (e), (g), (i) and (j) of subdivision one of this section.

APPENDIX E

RULES AND REGULATIONS FOR COMMUNITY USE OF SCHOOL FACILITIES

Groups requesting use of school facilities must be predominantly composed of residents and/or students from the Center Moriches school community. Outside non-for-profit organizations may request the use of a facility but approval will be granted only if it can be clearly demonstrated that there is a benefit to the Center Moriches school community.

1. An application for use of the school premises is to be secured from the district office. Said application must be completed and returned for subsequent approval or disapproval. On approval, a copy will be returned to the applicant.
2. The applicant will not be admitted to the premises prior to the time stipulated on the application, and every effort should be made to vacate the premises at the time stipulated in the application.
3. There shall be no gambling or use of intoxicating beverages at any time on the school premises.
4. If refreshments are to be served, all details must be stated in the application and the administration reserves the right to designate the area.
5. Applicants are responsible for any damage to school property.
6. Applicants are responsible for injury or liability incurred. The Board of Education may require the applicant to furnish a certificate of Insurance in accordance with the following:
   a. The Insurance carrier must be licensed by the NYS Insurance Dept. to conduct business in New York.
   b. The interests of the CMUFSD are to be included as an additional Insured; and such inclusion is to be evidenced by signed, original endorsement.

   c. Certificates are required on company imprinted stationery. "Acord" or other blank certificates are not acceptable. In the absence of company imprinted stationery, a letter of transmittal from the insurance company, signed by an authorized representative, will be acceptable.
   d. Limits of liability: Comprehensive general liability including products liability if applicable. $500,000 to $1,000,000 bodily injury and $50,000 property damage.
7. The school premises shall not be used by any group for religious purposes.
8. The use of the premises by political organizations must be secured in compliance with Section 414 of the Education Law of the State of New York.
9. A permit will not be issued for personal or private gain, financial or otherwise.
10. A permit for a social, civic, or recreational use shall be approved only if it can be non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event.
11. For an event where admission fees are charged, the proceeds must, by State law, be expended for an educational or charitable purpose.
12. Applicants are responsible for providing adequate supervision for all events in order to insure the proper conduct and discipline of such activity. A list of chaperones may be required to be submitted with the application.
13. For any activity involving school age children, a minimum of two adult supervisors must be present. Additional supervisors are to be provided for activities with large participation.

14. Only those facilities and items requested and approved may be used by the applicant.

15. The School District reserves the right to impose a charge for the use of the premises, according to the services rendered. Where special custodial or cleaning is required, fees will be imposed. A minimum fee will be collectible in advance. Additional charges will be billed as required.

16. The School District reserves the right to require its custodians to be on duty during the use of the facility by the applicant.

17. Smoking will be permitted only in the designated smoking areas.

18. No permit is valid unless signed by the authorized administrator.

19. The approved permit must be exhibited upon request to any representative, staff member or official of the School District.

20. The applicant's equipment and materials must be removed from the building promptly after its use so as not to interfere with school activities.

21. The permit is valid only for the time and purpose specified in the application. A new application must be filed at the beginning of each school year.

22. A permit is not transferable.

23. The school administration and the Board of Education may cancel any activity when the school facility is required for a school-sponsored event.

24. In order to insure the equitable use of school facilities for community use, all approved applications are subject to rescheduling and/or cancellation by the school administration.

25. It is the responsibility of the applicant to see that the facilities used are left in a clean and orderly condition and all waste materials deposited in the proper receptacle.

26. It will be the responsibility of the groups who have secured a permit for a scheduled use of the school facilities to inform the School District if the scheduled use will be changed or cancelled.

27. A permit that has been issued may be cancelled and future applications denied if the applicant fails to comply with the foregoing rules and regulations.

28. The School District has the right to prohibit any proposed activity which might be deemed detrimental to the best interests of the School District.

These regulations have been established in conformance with the intent as stated in Section 414 of the Education Law of the State of New York. In addition to this, all Federal and State Laws, Local Ordinances, and rules of the Police and Fire Departments regarding public assemblies must be strictly obeyed .

Supreme Court, U.S.
FILED
JUL 16 1992
OFFICE OF THE CLERK

No. 91-2024

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT,
LOUISE TRAMONTANO in her official capacity as
President of the Board of Education for
Center Moriches Schools, and
NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Was not the United States Court of Appeals for the Second Circuit correct when it held that the school property of the Center Moriches Union Free School District falls within the sub-category "limited public forum" the classification that allows it to remain non-public except as to the specified uses as provided in Section 414 of the Education Law of the State of New York and the Local rules of the Center Moriches Union Free School District?

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Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS IN OPPOSITION

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that this Court should deny the petition for a writ of certiorari. The petition seeks review of the opinion issued in this case by the United States Court of Appeals for the Second Circuit. The opinion is reported at 959 F.2d 381 (Second Circuit 1992).

COUNTERSTATEMENT OF THE CASE

Respondent, Center Moriches Union Free School (hereinafter "Center Moriches") is a subdivision of the State of New York and governed by the laws of the State of New York in the permissible uses of its school district facilities.

New York State Law authorizes the use of public school facilities for certain specified limited uses as provided in Section 414 of the Education Law of the State of New York.

The Center Moriches Union Free School District has adopted official rules governing the community use of school district facilities. The Center Moriches Union Free District has established a limited public forum that is not open to religious expression or other private use.

Center Moriches has consistently and methodically excluded any private, commercial or religious use from its facilities and indeed requires each applicant for use of school district facilities to certify that the facilities will be utilized in accordance with its rules and regulations. This policy is consistent with the policy expressed in Section 414 of the Education Law of the State of New York which has been construed as precluding use of school district facilities for religious purposes.

In furtherance of the State's intenion to continue to exclude religious activity from the limited public forum of public school districts, the New York State Legislature amended Section 414 of the Education Law in 1991 by adding subsection (j) which will allow the additional use of school district facilities: for graduation exercises held by not-for-profit elementary secondary schools, *provided that no religious service is performed* (emphasis supplied). This legislation took effect July 23, 1991.

In addition to excluding religious uses of school district facilities, the private uses and the use of school district facilities for commercial purposes, is precluded under the provisions of Section 414 of the Education Law of the State of New York and the rules and regulations of the Center Moriches Union Free School District regarding the use of its facilities.

Instead of having established an open forum, the Center Moriches Union Free School District pursuant to the provisions of Section 414 of the Education Law of the State of New York have established a limited public forum restricting the use of the school district facilities to cultural and educational activities consistent with the school district's preservation of the facilities for school related business and the welfare of the community rather than the promotion of a private expression or purpose.

The District Court found that the Center Moriches Union Free School District had not by its policy or practice opened its doors to similar (religious) uses. It is important to note at this point that the Appellants have stipulated that the film series was of a religious nature and the showing was for a religious purpose.

REASONS FOR DENYING THE WRIT

Notwithstanding Petitioners' claim, this case does not present a new issue but rather fits within the prior decisions of this Court which have held that school facilities may be deemed to be public fora only if school authorities have by "policy or practice" opened those facilities for "indiscriminate use by the general public" *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 47 (103 S.Ct. 948, 956, 74 L.Ed.2d 194) (1983), the District Court and the Second Circuit

have both found that the facilities of the Center Moriches Union Free School District did not constitute open fora.

Instead, the District Court found that by enforcing restrictions on access imposed by State Statute and by its regulations, Center Moriches Union Free School District has created a limited public forum, *Lamb's Chapel v. Center Moriches Union Free School District*, 736 F. Supp. at 1251. The District Court ruled that the Center Moriches Union Free School District "has not by policy or practice either opened its facilities to indiscriminate use by the general public or some segment of the public." *Id.*

It is fundamentally flawed premise of the Petitioners that the public schools of New York State are open fora. The Education Law of the State of New York Section 414 does not create or indeed permit open forums. It is a bold contention that New York State having allowed use of its schools for certain limited prescribed uses must now require that the facilities be opened to all applicants.

New York State public schools are at most limited public forums available for only those uses specified in the statute creating that forum. This Court has previously held a designated public forum as not created by government inaction or by its allowance of limited discourse, rather a designated public forum may be designated only by intent. The Courts must look to the policy and practice of government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum, *Cornelius* 473 U.S. at 802 quoting *Perry* 460 at 46.

A.

COURT OF APPEALS DECISION IS CORRECT AND CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

The First Amendment right of access does not accrue simply because the subject property is owned or controlled by the government, *United States Postal Service v. Council of Greenberg Civic Association*, 453 U.S. 114, 129 (1981). The State no less than a private owner of property has power to preserve the property under its control for the use to which it is lawfully designated, *Adderly v. State of Florida*, 385 U.S. 39, 47 (1966). Accord *Greer v. Spock*, 424 U.S. 828, 836 (1976).

This Court has recognized that the existence of a right of access to public private and the extent to which the government may place restriction on that right depends on the character of the property or "forum", *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37, 44 (1983); *Cornelius v. NAACP Legal Defense and Education Fund Inc.*, 473 U.S. 788 (1985).

This Court has recognized a sub-category of the designated public forum as the "limited public forum" which arises when a State designates public private to be used as a forum for some purposes but not others. A forum is thus created only for limited purposes such as use by certain groups or discussion of certain subjects, *Perry*, 460 U.S. at 45 n.7 and 48. See, e.g. *Greer v. Spock*, 424 U.S. at 838 n.10 (Political Candidates excluded from military reservation although other members of the public permitted to speak on other subjects); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (political advertising excluded from city's transit system although certain types of advertising accepted); *Monterey County Democratic Central Committee v. United States Postal*

Service, 812 F.2d 1194 (9th Circuit 1987) (only non-profit civic leagues or non-partisan organizations permitted to conduct voter registration drives on postal property; partisan voter registration efforts prohibited); *Calash v. City of Bridgeport*, 788 F.2d 80 (2nd Circuit 1986) (municipal auditorium available for use only by charitable and non-profit organizations; profit making organizations excluded).

When public property has been designated a limited public forum, it is considered a public forum only as to speakers for whose benefit the forum was created or "entities of similar character", *Calash*, 788 F.2d at 84 quoting *Perry*, 460 U.S. at 48. The rules of access for such persons or organizations for whose benefit the forum was created are the same as those applicable to traditional and designated public fora. However, in regard to those who are not members of the class intended to be benefitted by the creation of the limited forum, the public private remains a "non-public forum" and the rules of access for such persons and organizations are the same as those applicable to non-public fora, *Calash*, 788 F.2d at 84.

Courts have already acknowledged that public schools are not "traditional public fora". *Brandon v. Board of Education of Guilderland Central School District*, 635 F.2d 971, 980 (2nd Circuit 1980), *cert. denied* 451, U.S. 1123 (1981) (a high school is not a public forum where religious views can be freely aired).

Because New York schools are non-public fora as to non-enumerated uses, Petitioner's inability to obtain use of the school facilities need only to be reasonable and viewpoint neutral. Education Law Section 414 meets both of those requirements.

Although Education Law Section 414 lists nine explicit purposes for which public school property may be used during non-school hours, those purposes may be grouped into two general categories. The first category covers the type of activities which public schools are normally associated, education and activities for children. This category includes Section 414(1)(a) permitting schools to be used for instruction in any branch of education learning or the arts, Section 414(1)(g), permitting schools to be used for instruction of mentally retarded minors in classes provided by a private organization approved by the Commissioner of Education; Section 414(1)(i), permitting schools to be used to provide child care. The second general category includes the remaining six permissible uses set out in Section 414(1) covering social, civic and recreational activities of interest to or for the benefit of the public in general rather than that of specific identifiable groups.

Thus Education Law Section 414 does *not* single out religious uses for exclusion as did the university policy struck down in *Widmar v. Vincent*, 454 U.S. 263 (1981). Religious groups may not obtain access to New York Public Schools for religious purposes for the same reason that precludes labor unions, commercial activities or individuals seeking to utilize the school facilities for private purposes. Uses for private purposes not of interest to or benefit of public in general are precluded under the provisions of Section 414 of the Education Law.

The public/private distinction embodied in Section 414 is the most fundamentally reasonable distinction that can be made concerning access to public property that is not by tradition or designation open to the public in general. It is also reasonable given the Supreme Court's acknowledgement that restriction on access to

non-public fora may be imposed for purposes of avoiding controversy or the appearance of favoritism *Cornelius*, 473 U.S. at 811; *Lehman*, 481 U.S. at 304.

In addition to being reasonable, the non-inclusion of religious use on the list of permitted uses is also viewpoint neutral. The unavailability of access is not based on objection to the particular tenets of the applicant religious group. There is no discretion under Section 414 to grant permits to any religious group for religious use or other private purposes. The interest advanced by the applicants seeking a religious use permit is a private interest not a public one and therefore does not resemble the general category of uses permitted under Section 414.

Section 414 does not demonstrate hostility to religion or otherwise foster an entanglement with religion. Unlike the restrictive policies struck down in cases cited by appellants which after opening their fora for a wide spectrum of general uses expressly excluded religious use, New York Section 414 does not "carve out specific exclusions for speech with religious content" or "actively seek to exclude religious speech or religious groups from a public forum open to all others" or "suppress religious speech", rather Section 414 simply does not confer on a religious use the benefit of access to New York public schools, a benefit also not conferred on any other use not designated by statute.

The exclusion of petitioners from New York public schools is constitutionally permissible in regard to appellants' claim of a right of access, it also passes constitutional muster in regard to petitioner's equal protection claim. A claim of denial of equal access "fairs no better in equal protection garb" than "when cast as a First

Amendment argument" *Perry*, *supra* 460 U.S. at 54. When as in the case of a non-public forum an applicant has no fundamental right of access protected by the constitution, equal protection requires that only the applicant's exclusion from the forum be reasonable, *Id.* at 54-55. When an exclusion is reasonable for purposes of free speech clause of the First Amendment it is also reasonable for purposes of the equal protection clause of the Fourteenth Amendment, *Id.* at 54.

B.

THE COURT OF APPEALS DECISION IS CORRECT AND NOT IN CONFLICT WITH ANY DECISIONS OF ANY OTHER CIRCUITS.

The Second Circuit held that the Center Moriches Union Free School District facilities were "limited public forums" which had not been opened to religious groups by policy or practice. The Court therefore concluded that the facilities property were barred to the plaintiffs in accordance with the New York Education Law Section 414 and the school districts only local rules. This decision is consistent with the decisions of other circuits. Petitioners refer to the decision of *Grace Bible Fellowship Inc. v. Maine School Administrative District No. 5*, 941 F.2d 45 (First Circuit 1991). In that case the District Court had found that the local school board's policy was that "any group may use the (school) facilities as long as they do not seek to propagate or propound a religious message", 941 F.2d at 46. The Court determined that the permission extended by the school district to other activities was "so broad that it created a public forum" (*Id.*). As distinguished from Section 414 the policy in *Grace Bible Fellowship* expressly excluded religious uses (*Id.*). In fact the school district there was unable to cite a single example of a refusal of access to

any group *other* than religious organizations, *Id.* at 47; contrast New York Education Law Section 414 where the use of school district facilities has been denied for any private or commercial use. The school district in *Grace Bible Fellowship* had also granted access for activities, such as (non-religious) fund raising (*Id.*), that would be barred from New York schools by Section 414.

Similarly Petitioners rely on *Gregoire v. Centennial School District*, 907 F.2d 1366 (Third Circuit 1990) which turned on a factual finding that the sc ool district "by its policy and practice created a designated open forum". 907 F.2d at 1369. The decision was not based upon State Law, *Id.* at n.1, but only upon the facts of the case which showed that the school district had allowed a wide range of uses, including some religious uses but not others, *Id.* at 1373-76. Among its uses it had allowed which would be precluded under Section 414, were meetings of labor unions and commercial profit making ventures or those which charge admission. Again, unlike Section 414, the practice of the school district in *Gregoire* expressly excluded religious uses, *Id.* at 1372-73.

Consequently "on the facts of this case", *Id.* at 1378, the Third Circuit found that school district had created designated open forum that could not be denied based on the content of one particular religious group's intended speech. The Court described its holding as a narrow one, which is summarized as requiring the school district to "be consistent in granting facilities access", *Id.* at 1379.

Petitioners further cite *Knights of the Ku Klux Klan v. East Baton Rouge Parish*, 578 F.2d 1122. In that case the Court found that the policy adopted by the school board discriminated among applicants on the basis of the

content of the ideas of the applicant and on their membership and meeting attendance policies. The Court went on to find that the school district had established a public forum. Petitioners cite *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (Fifth Circuit 1989) wherein the Fifth Circuit upheld a preliminary injunction against a policy of access to a public library that excluded meetings *only* for "a religious or political purpose". 883 F.2d at 33. The Court found that the library as a matter of fact had been opened to groups "having little to do with the library's educational and artistic mission", *Id.* at 34 and therefore had created a public forum that could not be denied to other groups on the basis of content. Among the non-religious uses to which the library had been put and which would likely be barred in New York by Education Law Section 414 were a closed meeting of New York Navy recruiters (compare Section 414(1)(c), which required that meetings "pertaining to the welfare of the community" be "open to the public"), and a United Way meeting at which discussion was held of its funding request and budget.

Thus it is clear that the key aspect of the present case is the specific policy and practice of the State of New York and the Center Moriches Union Free School District in particular in designating the specific uses which are permitted on public school facilities, rather than creating open forums, has created a limited open forum for the uses designated in Section 414 of the Education Law of the State of New York and those uses only.

C.

THE STATE, IN ADDITION TO TIME, PLACE AND MANNER OF REGULATIONS, MAY RESERVE THE FORUM FOR ITS INTENDED PURPOSES, COMMUNICATIVE OR OTHERWISE, AS LONG AS THE REGULATION ON SPEECH IS REASONABLE AND NOT AN EFFORT TO SUPPRESS EXPRESSION MERELY BECAUSE PUBLIC OFFICIALS OPPOSE THE SPEAKER'S VIEW.

It is clear that the constitution does not require equal access to a limited open forum. A State may properly restrict the designated uses of a forum *U.S. v. Kokinda*, 110 S.Ct. 3115 (1990) and *Perry, supra.*

Neither does the establishment clause require unrestricted access to government facilities and a government is permitted to designate the uses as long as such designation is mutual. The policy in New York as espoused in Section 414 of the Education Law is not discriminatory but applies regardless of the speaker. Neither by tradition nor purpose can the public schools be described as satisfying the standards that this Court has previously set forth by identifying a public forum. The Center Moriches Union Free School District public school facilities are such public properties that unrestricted expressive activity is incompatible. They are among those publicly owned facilities that could be closed all except those who have legitimate business there. Government in appropriate circumstances may regulate conduct even if the conduct has an expressive content.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 91-2024

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IN THE

Supreme Court of the United States

OCTOBER TERM 1991

LAMB'S CHAPEL and JOHN STEIGERWALD,

Petitioners,

—against—

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT ATTORNEY GENERAL IN OPPOSITION TO THE PETITION FOR CERTIORARI

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IN THE

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OCTOBER TERM 1991

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—against—

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Respondents.

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BRIEF FOR RESPONDENT ATTORNEY GENERAL IN OPPOSITION TO THE PETITION FOR CERTIORARI

INTRODUCTION

New York State has chosen to make its public schools available during non-school hours for certain non-school uses, which are specified in its Education Law § 414. Within the limitations of the list of permissible uses, local school districts have discretion to consider individual applications to use their facilities. The state commissioner of education has consistently

held that uses not included in the statutory designation are improper. Although the list does not expressly exclude religious use, a New York appellate court has held that local school districts do not have discretion to permit such a use because the statute does not expressly authorize it.

The Court of Appeals for the Second Circuit held in this case that New York Education Law § 414 did not violate petitioners' First Amendment rights by failing to authorize their use of a local public school for concededly religious purposes. That determination applied settled law to the particular facts presented in this case. The Second Circuit's application of this Court's precedents was faithful to those decisions and was consistent with the way in which those precedents have been applied by other circuits to other facts. The difference in the outcome of this case from those of the selected cases in other circuits cited by the petition represents only a difference in the facts presented, and not a conflict among the circuits on the law to be applied.

STATEMENT OF THE CASE

a. Education Law § 414

Since at least 1864, New York has not made its public schools open for indiscriminate use by the general public. Rather, it has permitted such use only for particular purposes. New York Education Law § 414 (52a)[1] sets forth the non-school purposes for which New York's public schools may be used. The legislative history of that statute, and its interpretation and implementation by the state commissioner of education, demonstrate the strict limitation imposed by the statute on the discretion of local school boards in considering applications for non-school uses.

New York's public schools were first made available for after-school use in 1864. Laws of 1864, c. 555, title VII, § 52.

1 References to pages of the appendix to the petition appear herein as "__a".

That statute provided that the schools could be used for only two purposes:

> The trustees, or any of them, if not forbidden by another, may freely permit the school house, when not in use for the district school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning, or in the science or practice of music.

That provision is today embodied in subdivision (a) of section 414(1), which provides that public schools may be used "[f]or the purpose of instruction in any branch of education, learning or the arts".

Over the years section 414 and its predecessor statutes have been amended or re-enacted numerous times, and nine additional permissible uses of public school property have been added as subdivisions (b) through (j) of subsection 414(1). The use of school property for religious purposes has not been added to the approved uses set forth in section 414, and the New York Appellate Division has therefore held that such uses are beyond the discretion of local school districts. *Trietley v. Board of Educ. of the City of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dep't 1978).

In interpreting section 414, the New York education commissioner has consistently prohibited school districts from allowing their schools to be used for purposes not explicitly permitted by section 414.[2] Examples of that interpretation are found in the following decisions:

> Case No. 914, 31 State Dep't Rep. 447 (1924) (trustees could not rent school to an individual for the purpose of holding public dances or other forms of entertainment

2 The commissioner's decisions in this area are rendered on administrative appeals brought under New York Education Law § 310, which permits aggrieved parties to appeal from any "official act or decision" of school authorities concerning any "matter under this chapter, or any . . . act pertaining to common schools". It appears that no such appeal was brought to the commissioner in the present case.

for which admissions were charged which were not to be used for an educational or charitable purpose);

Case No. 1815, 41 State Dep't Rep. 423 (1931) (the use of school building by church societies and denominational organizations for entertainments and occasions where admission fees were charged and used for the benefit of the churches or the denominational organizations is not permitted by the Education Law);

Decision No. 7560, 5 Educ. Dep't Rep. 54 (1965) (school board properly refused use of school property to labor union local, as such use is not a "civic" use or other use "pertaining to the welfare of the community" within the meaning of section 414); and

Decision No. 10,799, 21 Educ. Dep't Rep. 585 (1982) (use of public school building for a private commercial venture violates section 414; the public purposes enumerated in section 414 do not include such use, and the board of education had no authority to give permission to use a school facility for any purpose other than those set forth in the statute).

None of the uses considered by those interpretations was precluded because it was religious in nature. Instead, like the use proposed in this case, they were precluded because they had not been included by the Legislature among the approved uses of public school property.

b. Proceedings below

Petitioners brought this action for declaratory and injunctive relief against respondents school district and the president of its board of education (the "school district") because of the school district's refusal to allow petitioners to use local school facilities during non-school hours for the purpose of showing a film series. *Lamb's Chapel v. Center Moriches Union Free School District*, 770 F. Supp. 91 (E.D.N.Y. 1991) (16a). Petitioners conceded that the film series was of a religious nature

and that its showing was for a religious purpose. 770 F. Supp. at 92 (18a).

On cross-motions for summary judgment, the district court found the facts to be undisputed, 770 F. Supp. at 92 (17a), and granted judgment to the local school district. The district court found that the school district had not, by its policy or practice, "opened its doors to groups akin to Lamb's Chapel", 770 F. Supp. at 99 (31a-32a), and held that the school district's denial of petitioners' applications was viewpoint-neutral and, hence, constitutional.

On appeal to the Second Circuit, petitioners asserted a challenge to the constitutionality of Education Law § 414 insofar as it failed to authorize their desired use of a public school. The New York Attorney General sought, and was granted, permission to intervene in defense of that challenge pursuant to 28 U.S.C. § 2403(b).[3] The Second Circuit affirmed the judgment. 959 F.2d 381 (2d Cir. 1992) (1a). Applying the principles established by this Court, principally in *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985), and *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), the Court of Appeals determined that New York had created in its public schools only a limited public forum, devoted only to the non-school uses specified in Education Law § 414. This case, the Court of Appeals wrote, "presented [an] outside organization[ ] seeking access where access has been limited and all religious use has been barred by policy and practice". 959 F.2d at 389 (15a). Accordingly, the court held that "there is no basis for any claim of First Amendment violation here" (*id.*) and affirmed in all respects.

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3 The Court of Appeals added the Attorney General to the caption of its decision as the "New York State Attorney General's Office".

REASONS FOR DENYING THE WRIT

1. The decision below is consistent with the decisions of this Court and those of other circuits.

This Court has recognized three types of fora for First Amendment purposes: the "traditional public forum", the "designated public forum", and the "non-public forum". *International Soc. for Krishna Consciousness, Inc. v. Lee*, ____ U.S. ____, 112 S. Ct. 2711, 60 U.S.L.W. 4749 (June 26, 1992); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983). A subcategory of the designated public forum is the "limited public forum", which arises when a state designates public property to be used for some purposes, but not for others. A forum is thus created only for limited purposes, such as use by certain groups or discussion of certain subjects, *Perry*, 460 U.S. at 45 n.7 and 48, and is considered a public forum only as to those speakers for whose benefit the forum was created, or "entities of similar character", and not as to others. *Id.* at 48.

Petitioners characterize the forum in this case as a designated public forum and, based on that assumption, claim that the decision below misapplied the decisions of this Court and conflicts with the decisions of other circuits. Their characterization is inaccurate: the court below correctly determined that this case involves a limited forum as that term has been developed by this Court in *Perry* and other cases. *E.g., Greer v. Spock*, 424 U.S. 828, 838 n.10 (1976) (political candidates excluded from military reservation although other members of the public permitted to speak on other subjects), and *Lehman v. City of Shaker Heights*, 418 U.S.298 (1974) (political advertising excluded from city's transit system, although other types of advertising accepted).

As the court below concluded, both the stated policy and the actual practice regulating access to the school property confirm the limited nature of the forum created. Because a public forum can be created only "by intentionally opening a non-traditional

forum for public discourse", *International Soc. for Krishna Consciousness*, 60 U.S.L.W. at 4751, quoting *Cornelius*, 473 U.S. at 802, courts look "to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum". *Cornelius*, 473 U.S.at 802, citing *Perry*, 460 U.S.at 47. This Court has held that evidence of that intention may be found in such factors as the statutory or regulatory scheme governing use of the property, *see Cornelius*, 473 U.S.at 805; *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 120-26 (1981); or the past policy and practice in regard to use of the property. *See Perry*, 460 U.S.-at 47; *Cornelius*, 473 U.S.at 804.

Thus, the Second Circuit appropriately looked first to the text of Education Law § 414, which on its face limits the forum to the specified uses (959 F.2d at 386-87 [10a-11a]), and then to the actual practice of the local school district, which showed that "none of the prior uses pointed to by the [petitioners] was for religious purposes". 959 F.2d 388 (13a). Consequently, the court concluded that the "facilities were limited forums not opened to religious uses by policy or practice", 959 F.2d at 388 (14a), and, therefore, that there was "no constitutional violation in the failure of the School District to afford access to [petitioners]". *Id.*

The petition contends that the decision below, denying access to New York public schools for religious speech, is in conflict with decisions of the First, Third and Fifth Circuits (Petition at 12-14). To the contrary, the decision is consistent with the legal analysis in each of the cases cited by the petition, and the results differ only because of the difference in the facts presented. In each of the cases cited by petitioners, a policy or practice established, as a matter of fact, the "indiscriminate use" that is a hallmark of the open forum available for all public uses. *Perry*, 460 U.S. at 47. In each of those cases, permission to use the government property was "granted as a matter of course to all" who sought it. *Id.* In the present case, on the other hand, there was only the "selective access" that

"does not transform government property into a public forum". *Id.*

In *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991) (Petition at 12), the local school board's policy was that "any group may use the [school] facilities, as long as they do not seek to propagate or propound a religious message", 941 F.2d at 46, and in fact the school district was unable to cite a single example of a refusal of access to any group other than religious organizations. *Id.* at 47. Similarly, *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253, 112 L. Ed. 2d 211 (1990) (Petition at 12), turned on a factual finding that the school district, "by its policy and practice, created a designated open forum" because it rented school facilities to a "wide range of community groups". 907 F.2d at 1369.[4] Further, the school district had permitted religious courses in its adult education program and then adopted a policy which "explicitly provided for religious discussion in several contexts", *id.* at 1372-73, while it attempted to exclude certain other religious speech because of the particular "conversion" message sought to be expressed. *Id.* at 1376.

In *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978) (Petition at 12), the school board had "historically permitt[ed], on a continuing *and indifferent* basis, the use of [school] facilities during non-school hours by private organizations". 578 F.2d at 1124 (emphasis added). Permission was granted "on a first-come, first-serve (*sic*) basis" and "no distinction between applicants" was made whatsoever. *Id.* at 1123. And in *Concerned Women for America, Inc. v. Lafayette Co.*, 883 F.2d 32 (5th Cir. 1989) (Petition at 12), the Fifth Circuit enjoined a policy of access to a public library which had excluded only "religious and political groups". 883 F.2d at 33. The head librarian had testified that, "once she determined that a group would not be meeting for a religious or political purpose, and that there was room on the calendar, she would grant the group permission to use the auditorium". *Id.*[5]

The petition also contends that the Seventh Circuit "has strongly suggested, albeit in *dicta*, that it would embrace the [rule for which petitioners argue]" (Petition at 13), citing *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1113-14 (7th Cir. 1986). But the most the Seventh Circuit suggested was that the plaintiff there would have a claim if the school authority,

> "while not obligated to allow teachers or anyone else to use school premises for meetings, in fact allowed the premises to be used for *any* meetings by teachers *except* prayer meetings."

787 F.2d at 1114 (emphasis added). Like the other holdings cited by the petition, that dictum suggests only that an otherwise-indiscriminate access policy may not single out religious use for exclusion. That conclusion is in no way inconsistent with the Second Circuit's determination that petitioners' rights were not infringed by the restricted access granted to New York's otherwise-non-public school property.[6]

---

4 Among the uses allowed in *Gregoire* were meetings of labor unions and commercial profit-making ventures which charged admission. 907 F.2d at 1373. Those uses would be precluded in New York under Education Law § 414. Compare Commissioner Decision Nos. 7560, 10,799 and 914, discussed above at pages 3-4.

5 Among the non-religious purposes for which the library in *Concerned Women for America* had been used—and which would likely be barred in New York by Education Law § 414—were a closed meeting of U.S. Navy recruiters [compare § 414(1)(c), which requires that meetings "pertaining to the welfare of the community" be "open to the public"], and a United Way meeting at which discussion was held of its funding requests and budget [compare New York Education Commissioner Case No. 1815]. 883 F.2d at 34.

6 Indeed, the Seventh Circuit in *May*, 787 F.2d at 1109, cited with approval the holding of the Third Circuit in *Student Coalition for Peace v. Lower Merion School Dist.*, 776 F.2d 431 (3d Cir. 1985). There, as here, the Court of Appeals upheld a denial of access to school premises, based solely on the applicant-group's intended use of the school, because "the school had in the past also rejected requests to use the field by [other] nonschool sponsored groups". 776 F.2d at 434. In addition, as in

New York has not "selectively exclude[d]" users, on the basis of their religious speech or otherwise, as petitioners contend (Petition at 13), nor has it granted indiscriminate access to its schools. Instead, New York simply has not designated its schools as a "public forum for community events", *Student Coalition for Peace*, 776 F.2d at 437, other than for the particular purposes set forth in Education Law § 414. On the facts of this case, the Second Circuit correctly held that New York's schools are "limited forums not open to religious uses". 959 F.2d at 388 (14a). That holding is consistent with this Court's forum analysis and is not in conflict with the holding of any other circuit.[7]

The petition's second argument (Petition at 14) suffers an infirmity similar to the first and, indeed, relies primarily on the same decisions. It contends that, because public school facilities in other states have been found to be public fora, then so must New York's schools. But, again, the petition pays no heed to the different facts in each of the cases it cites, which explain the different holdings without any conflict in legal analysis.

Thus, as in *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991) (Petition at 15); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253, 112 L. Ed. 2d 211 (1990) (Petition at 15); and *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978) (Petition at 15), which were distinguished above at page 8, *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (*en banc*) (Petition at 15), involved a factual situation in which "*no* group ha[d] been denied the use of

the present case, the disappointed applicant "ha[d] not met its burden of showing that . . . permission was in fact granted *as a matter of course*". *Id.* at 436 (emphasis added).

7 In *Salinas v. School Dist. of Kansas City, Mo.*, 751 F.2d 288 (8th Cir. 1984), also cited by the petition (at 13), the Eighth Circuit considered a policy that "specifically states that permits will be granted to religious groups". 751 F.2d at 290. The policy decision by the Kansas City school district to open its schools to religious uses does not compel New York to adopt the same policy. *See* discussion at page 13, *infra*.

an available auditorium except the [applicant in that case]". 473 F.2d at 1013 (emphasis added). The factual record there showed the school board's "repeated exercise of its discretionary authority to rent the Yorktown High School auditorium . . . on a *first-come first-served basis*". *Id.* at 1014 (emphasis added).

Unlike each of the cases cited by the petition, the historical record in New York, and the undisputed factual record in this case, show that neither New York nor the local school district has been indifferent to the nature of applications for non-school use of public schools. Rather, the state education commissioner, the New York courts and the local school district involved in this case have all consistently limited the use of New York's public schools to the specific purposes set forth in Education Law § 414, and precluded all other applications, not just petitioners'. In short, neither petitioners nor their requested use have been singled out from an otherwise-indiscriminate use policy. *Compare* Petition at 16-17.[8]

Petitioners next argue in the alternative that, "even if the relevant forum is deemed nonpublic", the Second Circuit decision conflicts with decisions of this Court (Petition at 17). The peti-

8 The district court decisions cited by the petition (at 16), like the court of appeals decisions on which it relies, also deal with factual circumstances substantially different from those at issue here. ***Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers***, 735 F. Supp. 745, 752 (M.D. Tenn. 1990), held that a public school which was "ordinarily used for public events *of all types*" (emphasis added) could not be "discriminatorily closed" to one organization. ***Wallace v. Washoe Co. School Dist.***, 701 F. Supp. 187 (D. Nev. 1988), decided that a school district which had effectively placed no restrictions on the organizations that could use its facilities had created a public forum, but also held that the school district could nevertheless deny a church's application to convert a portion of the high school into a permanent site for church services and activities. And the school district in ***Country Hills Christian Church v. Unified School Dist. No. 512***, 560 F. Supp. 1207 (D. Kan. 1983), had established a record of allowing indiscriminate public use of its facilities, including use by some area churches, and therefore could not single out one use for exclusion. 560 F. Supp. at 1211 (Finding # 20), *as amended*, *id.* at 1221.

tion misapprehends this Court's precedents, whereas the Second Circuit followed them appropriately.

Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter, so long as the distinctions are reasonable. *Perry*, 460 U.S. at 49. *See also International Soc. for Krishna Consciousness*, 60 U.S.L.W. at 4752. New York has made such a distinction here by designating the particular purposes for which its schools may be used. It has not excluded religious matters from an open forum; rather, it has created a limited forum, for specified uses only, and religious use is not among those specified.[9]

Petitioners' claim that the "exclusion" here is not viewpoint neutral (Petition at 18) is also without merit. The exclusion of a category of speech is viewpoint neutral so long as it is not intended to conceal a "bias against the viewpoint advanced by the excluded speakers". *Cornelius*, 473 U.S. at 812. In *Cornelius*, this Court found the exclusion of "all advocacy groups" to be facially viewpoint-neutral, but remanded because "the purported concern to avoid controversy excited by *particular* groups may conceal a bias against the viewpoint advanced *by the excluded speakers*". 473 U.S. at 812 (emphasis added). Significantly, the groups seeking access in *Cornelius* had "offered some evidence to cast doubt on [the] genuineness [of the purported concern]". *Id.*

Here, petitioners offered no evidence whatever that the exclusion of religious speech was designed to hide a bias against the Evangelical Christian viewpoint they espoused (2a; and see 4a-6a), as opposed to the religious viewpoints others might seek to present. The district court found (31a-32a; 45a-46a), and the Second Circuit affirmed (12a-14a), that no other groups—regardless of their particular religious viewpoints—had been permitted to use the Center Moriches schools for religious purposes. And the New York statute, on its face, permits *no* religious use, regardless of viewpoint. *Trietley v. Board of Educ. of the City of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dep't 1978). Plainly, these petitioners were not denied access to the public school because of their viewpoint, but because they proposed a use that did not fall into a category authorized by the statute.

9 Petitioners argue that New York's "exclusion" of religious speech from its public schools is not based on subject matter, but on the content of their film series (Petition at 18). Even if it were true that, if petitioners had sought to show a film series with "no references to a religious perspective, the series would clearly be unobjectionable" (Petition at 18)—at least so long as it met one of the criteria specified in Education Law § 414—in fact the subject matter of their film series was concededly religious (4a-6a). Therefore, it could be excluded from the forum which had been opened by statute only to certain other subject matters.

2. This case does not raise any issue under the Establishment Clause.

The final issue posed by the Petition (19-21) contends that the decision of the Second Circuit is in conflict with this Court's decisions under the Establishment Clause. There is no basis to the contention.

The Establishment Clause permits the adoption of a policy of equal access to public school property. *Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). However, nothing in the petition supports an extension of those cases to hold that the Establishment Clause *requires* the adoption of such a policy. As the district court observed:

> "[T]he question to be decided by this Court, post-*Mergens*, is not whether the school district *may*, under circumstances where its policy, practice or state law otherwise provide for such access, open its forum to religious use, but whether it *must* open its forum to such use in the face of a policy, practice and in New York a state legislative enactment (§ 414 [of the] Education Law) which specifically prohibits such use. . . . This Court finds no such mandate in the *Mergens* decision."

770 F. Supp. at 96 (26a) (emphasis original; internal quotations omitted).

The petition also argues that the Establishment Clause is violated here because "an educational institution which excludes private religious speech 'would need to determine which words and activities fall within' " that category. Petition at 20, quoting *Widmar*, 454 U.S. at 272 n.11. Thus, the petition contends, the school authority "would inevitably entangle itself unconstitutionally with religious affairs by the mere enforcement of its policy of religious exclusion" (Petition at 20).

That question is not properly presented here. There was no dispute in either court below, as there is no dispute here, that the events petitioners wished to conduct were religious in nature. Indeed, petitioners' applications stated that their "paramount objective [was] to share the love of Christ" (4a); that their film series advocated "a loving home where Christian values are instilled from an early age" (5a); and that the film series presented "a Christian perspective". 959 F.2d at 383-84 (6a). Petitioners left no room for doubt that their activities were religious and, therefore, that those activities were not authorized by Education Law § 414.

CONCLUSION

The petition for a writ of certiorari should be denied. The decision of the Second Circuit carefully followed this Court's precedents and differed in its result from cases in other circuits only because the facts presented here were different. The petition does not, and cannot, demonstrate that the Second Circuit has pursued a "deviant course" (Petition 21) by holding that a State may limit the non-school purposes for which its public schools may be used.

Dated: New York, New York
August 7, 1992

Respectfully submitted,

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 91-2021

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY TO BRIEFS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2024

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY TO BRIEFS IN OPPOSITION

In this case a public school district, which opens its facilities (after hours) to non-school community groups for every "civic, social and recreational" purpose, has denied permission to an otherwise eligible group solely because that group wishes to show a film containing a *religious* perspective. The question presented is whether a government body—here, a school district—may designate a forum for speech by private citizens for virtually all noncommercial purposes except religious speech.

The decision of the Second Circuit in this case is in sharp and direct conflict with the decisions of at least four other federal circuits. This Court should grant review to resolve this conflict.

Background

The material facts of this case are undisputed.

The respondent Center Moriches Union Free School District (CMUFSD) maintains an explicit policy of discrimination against any otherwise eligible group that wishes to use CMUFSD facilities for what CMUFSD deems to be "religious purposes": "The school premises shall not be used by any group for religious purposes." Rules and Regulations for Community Use of School Facilities (Rules & Regs.) #7 (App. 57a). The CMUFSD denied permission to Lamb's Chapel[1] (a church) and John Steigerwald (pastor of the church), the petitioners in this case (hereinafter collectively, "Lamb's Chapel"), to use school facilities to show a film series on contemporary family issues. Pet. at 5-7. The series featured noted commentator Dr. James C. Dobson, president of Focus on the Family. Pet. at 6 & n.3. A CMUFSD official explained that the film series "does appear to be church related and therefore your request must be refused." Plaintiffs' Ex. 6d, 7b. *See* Pet. at 6-7.

Neither CMUFSD nor the intervenor respondent New York State Attorney General's Office (State AG) question the eligibility of Lamb's Chapel, as a community organization, to use school facilities. *Accord* Tr. 69-70 ("church groups" not *per se* ineligible). Nor does either respondent identify any bar to the use of school facilities to show a film, open to the public, addressing family issues. *CMUFSD's sole objection is to the religious perspective of the film series.* This is undisputed. *See* Pet. at 5-7.

---

[1] Lamb's Chapel is a not-for-profit corporation. It has no parent company or subsidiaries.

Public/private purposes

CMUFSD tries to justify its exclusion of Lamb's Chapel by drawing a distinction between use of school facilities for "private purposes" and use for "public purposes." *See* Brief of Defendants-Respondents in Opposition (CMUFSD Brief) at 3, 7, 8. The court below embraced no such theory. But even assuming that a "public/private purpose" distinction were coherent and capable of equitable administration in this particular context, this classification is of no use to CMUFSD here. The film series Lamb's Chapel planned to show was to be open to the general public, Tr. 11-12; Plaintiffs' Exs. 6a, 7a, and the topic—contemporary family issues—is clearly of "public" interest. CMUFSD does not argue that addressing family issues is somehow a less "public" purpose than a meeting of the Holiday Beach Property Owners Association or the Manorville Humane Society, which CMUFSD allows, Pet. at 4. Ultimately, then, CMUFSD can do no more than assert an unprecedented *per se* equation of a "religious" use with a "private" use, CMUFSD Brief at 8.

Circuit conflict

CMUFSD has denied Lamb's Chapel access on terms equal with all other community groups solely because of the "religious purpose" of Lamb's Chapel's planned film presentation. CMUFSD explicitly concedes that the forum it has "established" is "not open to religious expression," CMUFSD Brief at 2. The Second Circuit sustained this explicit discrimination against religious speech, placing the Second Circuit in direct conflict with the decisions of at least four other federal circuits. *See* Pet. § I (conflict on merits with First, Third, and Fifth Circuits);[2]

---

[2] *See Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990); *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978); *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989).

id. § II (conflict on "public forum" issue with First, Third, Fourth, and Fifth Circuits).[3] *No* case outside of the Second Circuit has departed from the uniform judicial condemnation of the censorship of free expression, including religious expression, in school facilities made available as a forum for outside use. *See* Pet. at 13, 15-16 (listing additional cases in Seventh and Eighth Circuits and district court cases in Sixth, Ninth, and Tenth Circuits).

The respondents CMUFSD and the State AG fail in their attempts to distinguish away this mass of contrary precedent.

In essence, both respondents make the claim that this case is "different," Brief for Respondent Attorney General in Opposition to the Petition for Certiorari (AG Brief) at 10, because access to CMUFSD facilities is "selective," *id.* at 7, and available only for "certain limited prescribed uses," CMUFSD Brief at 4. These characterizations mask the undisputed factual reality of the situation: there are no significant limitations on the noncommercial community use of CMUFSD facilities.

CMUFSD identifies a New York state statute as the source of the supposed "limitations" on the use of school facilities. *See* N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 1992) (App. 52a-55a). But, as explained in the petition for certiorari, this statute explicitly authorizes the after-school community use of public school facilities for "holding social, civic and recreational meetings and entertainments" which are "non-exclusive and open to the general public," *id.* § 414(1)(c) (App. 53a). CMUFSD

[3] *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (3d Cir. 1990); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc); *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978).

itself likewise authorizes "social civic, or recreational use" of school facilities after hours by community groups. Rules & Regs. #10 (App. 57a).

CMUFSD concedes that state law and its own policy permit after-school community use of school facilities for all "cultural and educational activities consistent with . . . the welfare of the community," CMUFSD Brief at 3. CMUFSD has welcomed everything from a humane society to a property owners association, a dance recital, a gospel singing performance, and numerous other non-school uses. Pet. at 4-5. Neither CMUFSD nor the State AG has identified *any group* (aside from Lamb's Chapel) *ever denied access* by CMUFSD.

CMUFSD claims not only to bar religious speech but also to impose a hodge-podge of restrictions on access to its facilities for certain nonreligious speech as well. CMUFSD, however, has seriously misrepresented the law and the facts of this case:

—CMUFSD claims that state law forbids labor unions from using school facilities. CMUFSD Brief at 7, 10. CMUFSD identifies no statutory basis for this supposed restriction, and in fact CMUFSD has permitted union use of school facilities. *See* Plaintiffs' Ex. 21 (calendar of uses of CMUFSD facilities, entry for Oct. 22, 1988: "Union Meeting (Custodial Dept.)").

—CMUFSD claims that state law forbids access for charitable fundraising. CMUFSD Brief at 10. State law contains no such prohibition; on the contrary, the relevant statute explicitly authorizes collection of funds for "an educational or charitable purpose," § 414(1)(d) (App. 53a). Moreover, CMUFSD has permitted outside groups to conduct fundraisers in school facilities. *E.g.*, Plaintiffs' Ex. 20 (Manorville Humane Society Chinese Auction: applicant's stated purpose was "[t]o raise funds for the Manorville Humane Society's work"); Plaintiffs' Ex. 22 (Moriches Pa-Qua-Tuck Squaws Chinese Auction:

applicant stated that "money made goes [to] Camp Paquatuck").

—CMUFSD claims that state law forbids "meetings . . . which charge admission." CMUFSD Brief at 10. But in fact both state law and CMUFSD policy explicitly authorize such meetings, *see* § 414(1)(d) (App. 53a); Rules & Regs. #11 (App. 57a), and CMUFSD has permitted users of school facilities to charge admission, *e.g.*, Plaintiffs Exs. 9a, 12a, 14 (concerts and cultural program).

In short, neither state law nor CMUFSD policy and practice impose any meaningful limitations on any noncommercial uses *except those which present a religious perspective* on otherwise unobjectionable subject matter.[4]

The efforts of the State AG to distinguish away the conflicting decisions of the other circuits likewise fails:

—The State AG emphasizes that in the contrary cases, access was available on a "first-come, first-served" basis. AG Brief at 8, 11. But access to CMUFSD facilities follows a similar "first-come, first-served" policy. *See* Tr. 67 (testimony of CMUFSD business manager), 131 (testimony of CMUFSD superintendent).

—The State AG notes that in the contrary cases, school districts allowed access to a "wide range of community groups." AG Brief at 8 (quoting Third Circuit opinion); but the same is clearly true here, Pet. at 4-5.

[4] CMUFSD policy explicitly forbids use of school facilities "for religious purposes." Rules & Regs. #7. While state law does not explicitly discriminate against religious speech, an intermediate state appellate court has construed § 414 of the state education law to contain a prohibition on religious uses. *Trietley v. Board of Educ.*, 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978). The constitutional validity of these parallel bans on religious speech is precisely the issue presented here.

—The State AG points out that in at least one of the contrary decisions, no group had been denied access except for the plaintiff in that case. AG Brief at 10-11; but neither the State AG nor CMUFSD have identified any group other than Lamb's Chapel which was ever denied access to CMUFSD facilities.

The inescapable fact is that the decision of the Second Circuit cannot be reconciled with the contrary decisions of other federal courts of appeals that have addressed situations factually indistinguishable from the present case. Pet. §§ I, II. Lamb's Chapel repeatedly called the attention of the Second Circuit to the contrary decisions of sister circuits, *see* Brief of Appellants at 24-27, 41; Reply Brief of Appellants at 3; nevertheless, the opinion of the court below does not even cite, must less attempt to distinguish, the conflicting decisions of these other circuits. The Second Circuit has therefore become a law unto itself on the question of equal access to school facilities for religious speech. *See* 959 F.2d at 386-87 (App. 9a-12a) (relying upon line of Second Circuit decisions); *id.* at 387 (App. 11a) (citing *stare decisis* as precluding reexamination of Second Circuit precedents).

As explained in further detail in the petition for certiorari, CMUFSD's policy of censorship of religious speech conflicts not only with the decisions of other circuits but also with the decisions of this Court governing access both to public and nonpublic fora. *See* Pet. §§ I-III; *see also id.* § IV (conflict with Establishment Clause jurisprudence of this Court).

The State AG has frankly defended the exclusion of Lamb's Chapel on the basis that the proposed film series "presented a Christian perspective," AG Brief at 14 (quoting opinion of Second Circuit). Such anti-religious viewpoint discrimination against speech by private citizens is intolerable under the First and Fourteenth Amendments to the Constitution.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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No. 91-2024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 16, 1992
CERTIORARI GRANTED OCTOBER 5, 1992

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RELEVANT DOCKET ENTRIES

I. U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK—No. 90-CV-500

Date	No.	Proceedings
2/9/90	1	COMPLAINT filed * * *
* * *		
3/5/90	3	MOTION by Lamb's Chapel, John Steigerwald for preliminary injunction * * *
* * *		
3/5/90	6	ANSWER to Complaint by Center Moriches Ufsd, Louise Tramontano * * *
* * *		
3/22/92	10	Calendar entry: hearing ordered and begun; hearing concluded; decision reserved. Before Wexler, J. * * *
* * *		
5/18/90	23	MEMORANDUM and OPINION pltffs request for preliminary injunction is denied (signed by Judge Leonard D. Wexler) * * *
6/11/90	24	NOTICE OF APPEAL by Lamb's Chapel, John Steigerwald * * *
6/29/90	25	TRANSCRIPT of trial before Wexler, J. filed for dates of 03/14/90 * * *
7/5/90	26	MANDATE OF USCA (certified copy) dated 6/29/90 RE: [24-1] appeal withdrawing [24-1] appeal, w/o costs and fees for time spent on appeal. Pltffs retain right to raise, in any appeal from final judgment, all issues sought to be raised herein. * * *
* * *		
11/16/90	33	MOTION by Center Moriches Ufsd, Louise Tramontano for summary judgment * * *
11/16/90	34	MOTION by Lamb's Chapel for summary judgment * * *
* * *		

Date	No.	Proceedings
12/6/90	39	Calendar entry: Before Wexler, J. on 12/6/90 case called; motion argued; decision reserved; parties to submit briefs w/in 7 days. * * *
* * *		
7/15/91	43	ORDER dtd 7/15/91 denying pltfs [34-1] motion for summary judgment, granting defts [33-1] motion for summary judgment Clerk is directed to close file. (Signed by Judge D. Wexler) * * *
7/16/91	44	JUDGMENT dtd. 7/16/91 for Center Moriches Ufsd, Louise Tramontano against Lamb's Chapel, John Steigerwald (pltff. take nothing of the defts and action is dismissed in its entirety) * * *
* * *		
7/22/91	45	NOTICE OF APPEAL by Lamb's Chapel, John Steigerwald * * *
* * *		
8/27/91	47	ORDER dtd 8/27/91 on stip of parties, that the record on appeal is to include all exhibits (signed by Judge Leonard D. Wexler) * * *

II. U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

10/30/91	Order granting New York State Attorney General leave to intervene
11/4/91	Oral argument
3/18/92	Opinion affirming judgment of district court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. ———

LAMB'S CHAPEL, and JOHN STEIGERWALD,
Plaintiffs,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, and LOUISE TRAMONTANO in her official capacity as president of the Board of Education for Center Moriches Schools,
Defendants.

VERIFIED COMPLAINT FOR CIVIL RIGHTS VIOLATION: JURY DEMANDED

LAMB'S CHAPEL and JOHN STEIGERWALD state the following complaint:

INTRODUCTION

1.

This is a civil rights action seeking declaratory and injunctive relief against the discriminatory exclusion of JOHN STEIGERWALD and LAMB'S CHAPEL from public facilities by the CENTER MORICHES UNION FREE SCHOOL DISTRICT (hereinafter "SCHOOL DISTRICT"). The SCHOOL DISTRICT allows a wide variety of groups and individuals to use the SCHOOL DISTRICT's facilities for meetings, concerts, etc., but refuses to permit JOHN STEIGERWALD and LAMB'S CHAPEL to use those facilities because of the religious content of a movie which they wish to show.

2.

The actions of the SCHOOL DISTRICT are based on an official government policy, and the actions were taken under color of state law. The refusal to allow the use of the SCHOOL DISTRICT facilities violates the Plaintiffs' rights of free speech, freedom of assembly, free exercise of religion and equal protection under the law, as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

JURISDICTION AND VENUE

3.

Jurisdiction for this case is based upon 28 U.S.C. 1331, § 1343 (3) and (4).

4.

Venue for this case is properly in the Eastern District of New York, pursuant to 28 U.S.C. § 1391, in that all acts alleged occurred herein.

PARTIES

A. *Plaintiffs*:

5.

LAMB'S CHAPEL is an evangelical Christian church located in Center Moriches, New York. The purpose of LAMB'S CHAPEL is to promote the Christian gospel through Christian fellowship, charity, worship, study of the Holy Bible, and evangelistic outreach to the surrounding community.

6.

JOHN STEIGERWALD is the pastor of LAMB'S CHAPEL, and is a citizen and resident of Center Moriches, New York.

B. *Defendants*:

7.

The CENTER MORICHES UNION FREE SCHOOL DISTRICT, established by Suffolk County and created under the laws of New York, on information and belief, in conjunction with the local school board for the SCHOOL DISTRICT, provides funding and oversight for the SCHOOL DISTRICT facilities.

8.

LOUISE TRAMONTANO, is sued in her official capacity as President of the Board of Education for Center Moriches schools. On information and belief LOUISE TRAMONTANO has control and final authority over the SCHOOL DISTRICT's "Rules and Regulations for Community Use of School Facilities" policy, and how said policy is implemented.

FIRST CAUSE OF ACTION—VIOLATON OF FREEDOM OF SPEECH AND ASSEMBLY CLAUSES

9.

The SCHOOL DISTRICT has two auditoriums (one located at the elementary school and one located at the high school) plus various meeting rooms and gymnasiums where SCHOOL DISTRICT officials permit meetings and performances by groups and individuals unrelated to either the elementary school or the high school.

10.

The SCHOOL DISTRICT has an official facilities use policy entitled "Rules and Regulations for Community Use of School Facilities" (*see* Exhibit A), which reads in part:

> 7. The school premises shall not be used by any group for religious purposes. . . .

10. A permit for a social, civic, or recreational use shall be approved only if it can be non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event.

11.

On or about November 21, 1988 JOHN STEIGERWALD submitted an application to use a SCHOOL DISTRICT auditorium. His church, LAMB'S CHAPEL, wished to show a film series by Dr. James Dobson (hereinafter "Film Series") concerning family issues that was to be free to the public. The desired showing times were either to be on a sunday or on five consecutive Wednesday evenings.

12.

On or around that same date JOHN STEIGERWALD wrote a letter to Alice M. Schoener, District Clerk and Business Manager for the SCHOOL DISTRICT, explaining the reasons why the church wanted to use the SCHOOL DISTRICT facilities. In a letter dated November 23, 1988 Alice M. Schoener replied to JOHN STEIGERWALD's request stating:

> I am in receipt of your November 21 letter requesting the use of the high school for your sunday services. Unfortunately, in accordance with No. 7 of our currently existing rules and regulations, your request must be denied (See New York Education Law 414, which governs the board's position).

13.

On or about December 16, 1988 JOHN STEIGERWALD again applied to use the SCHOOL DISTRICT facilities for the Film Series. In a letter dated January 18, 1989 Alice M. Schoener questioned whether LAMB'S CHAPEL should have access to the school district facilities stating:

> I think you understand my reluctance to unilaterally grant these requests. As indicated in my earlier letter to you, we are bound by education law concerning the use of school facilities by religious organizations. Fortunately, we have not, to date, been put to the test of determining when a use of a facility by one of our local churches would constitute "religious purposes." I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations. . . .
>
> If you care to pursue your request, please provide a more detailed description of your proposed use. . .

14.

JOHN STEIGERWALD provided a description of the Film Series and provided a brochure about it in a letter dated February 2, 1989. After receiving the letter and brochure, Alice M. Schoener denied the LAMB'S CHAPEL request to use the SCHOOL DISTRICT facilities stating:

> I received your February 2 letter with the brochure describing the film you propose to show. This film does appear to be church related and therefore your request must be refused.

16.

JOHN STEIGERWALD and LAMB'S CHAPEL applied twice more to use the SCHOOL DISTRICT facilities on or about March 31, 1989 and November 30, 1989. Both times the church was denied access to the facilities.

17.

Defendant SCHOOL DISTRICT has created an "open forum" at the high school and elementary school, and has allowed a wide assortment of groups to meet and per-

form in those facilities. For example, in the past two years 1988-1989, the SCHOOL DISTRICT allowed the following groups, among others, to use the facilities or perform there:

Hampton Council of Churches' Billy Taylor Concert
Center Moriches Co-op Nursery School's Quilting Bee
Manonville Humane Society's Chinese Auction
Moriches Bay Power Squadron
Unkechaug Dance Group
Paul Gibson's Baseball Clinic
Moriches Bay Civic Association
Moriches Chamber of Commerce's Town Fair Day
Center Moriches Drama Club
Center Moriches Music Award Association's "Amahl & the Night Visitors"
Saint John's Track and Field Program
Girl Scouts of Suffolk County
Cub Scouts Pack 23
Boy Scout Troop #414

18.

In addition to the above, a psychology and parapsychology seminar sponsored by a New Age religious group known as the "Mind Center" dealing with, among other topics, eastern mysticism and metaphysics was held in SCHOOL DISTRICT facilities during the month of October, 1986. The Southern Harmonize Gospel Singing Show was approved to use the SCHOOL DISTRICT facilities on March 12, 1988. Also, the Salvation Army Youth Band performed at the high school on Oct. 29, 1989. By opening this forum to these meetings and performances with particular religious messages, this forum cannot be closed to others based on the religious content of their message. *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676 (2nd Cir. 1988).

19.

Because the SCHOOL DISTRICT has created an open forum at its auditorium, defendants' policy on its face, (which excludes religious use of school facilities), and their refusal to allow LAMB'S CHAPEL and JOHN STEIGERWALD to use the SCHOOL DISTRICT's facilities, is content-based discrimination in violation of the Plaintiffs' free speech and freedom of assembly rights guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. *See Widmar v. Vincent*, 454 U.S. 263 (1981).

20.

The defendants' policy prohibiting school facilities use for religious purposes serves no compelling state interest, and is not the least restrictive means to satisfy a compelling government interest.

21.

In violation of the Civil Rights Act of 1866, 42 U.S.C. § 1983, the defendants have acted under color of state law to deprive the plaintiffs of their rights to freedom of speech and freedom of assembly, guaranteed under the First and Fourteenth Amendments to the U.S. Constitution, by refusing to allow plaintiffs to use school facilities that are open fora for use by a wide variety of organizations.

22.

The SCHOOL DISTRICT's policy also is facially invalid on free speech grounds under the overbreadth doctrine, because the policy specifically bars any group from the use of the school facilities because of the religious content of their speech. Also, Alice M. Schoener's sole discretion in determining what is or is not overly religious and therefore permissable or not permissable speech, constitutes unconstitutional unbridled discretion on the part of a government official. *See Saia v. New York*, 334 U.S. 558, 562 (1948). It is the unbridled

discretion in the application and interpretation of the policy by SCHOOL DISTRICT officials, resulting in the deprivation of the plaintiffs' First Amendment rights, which is content-based discrimination in violation of the free speech and assembly provisions of the First and Fourteenth Amendment. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

SECOND CAUSE OF ACTION—VIOLATION OF EQUAL PROTECTION CLAUSE

23.

Plaintiffs repeat and reallege Paragraphs 1 through 17.

24.

The defendants have created an open forum as to SCHOOL DISTRICT facilities. Defendants' policy allowing groups to use these facilities for some purposes (defined by the content of the expression), while denying other groups the right to meet or perform (defined by the content of the expression) violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *See Police Dept. v. Mosley*, 408 U.S. 92 (1972).

25.

The SCHOOL DISTRICT bases its exclusion on a suspect classification (religion) and infringes on fundamental rights (freedom of speech, assembly and free exercise of religion). Because the SCHOOL DISTRICT's policy is based on a suspect classification and infringes on fundamental rights, it violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

26.

The defendant's actions were taken under color of state law, and are in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1983.

THIRD CAUSE OF ACTION—VIOLATION OF FREE EXERCISE CLAUSE

27.

Plaintiffs reallege Paragraphs 1 through 17.

28.

Plaintiffs have evangelical Christian beliefs, including sincere religious beliefs about discussing the Bible, evangelizing the Christian gospel in public arenas, and advocating traditional Judeo-Christian family values. Plaintiffs' religious beliefs are burdened by the defendant's refusal to let them use the SCHOOL DISTRICT facilities, which are open for use by other groups. The U.S. Supreme Court in *Schneider v. State*, 308 U.S. 147, 163 (1939) said,

> One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

29.

Defendant SCHOOL DISTRICT, as a unit of the government, has a constitutional duty to accommodate sincerely-held religious beliefs. The U.S. Supreme Court in *Hobbie v. Unemployment Appeals Comm'n.*, 480 U.S. 136, 144 (1987) said,

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.

The defendants have not accommodated the plaintiffs' religious beliefs. The defendants have no compelling state interest to justify this burden on plaintiffs' religious beliefs, and the defendants are not using the least burden-

some means to satisfy the state interest, which violates plaintiffs' rights to free exercise of religion, as guaranteed under the First and Fourteenth Amendments to the U.S. Constitution.

30.

The defendants' burden on plaintiffs' religious beliefs is done under color of law, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1983.

FOURTH CAUSE OF ACTION—VIOLATION OF ESTABLISHMENT CLAUSE

31.

Plaintiffs reallege Paragraphs 1 through 17.

32.

Defendant SCHOOL DISTRICT has a duty under the Establishment Clause to the First Amendment of the U.S. Constitution to be neutral in the area of religion. By favoring expression for nonreligious purposes in the SCHOOL DISTRICT's auditorium, but forbidding expression for religious purposes, the SCHOOL DISTRICT violates the Establishment Clause. The primary effect of the defendants' actions and policy is the inhibition of religion, in violation of the Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

33.

In addition, by allowing other events to take place in the auditorium but refusing plaintiffs the same right because of the religious content of their speech, the defendants' primary effect is to discriminate because of religious beliefs. The SCHOOL DISTRICT is thereby fostering a policy which prefers nonreligion over religion in violation of the Establishment Clause.

34.

The defendants' actions were taken under color of state law, and are in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1983.

PRAYER FOR RELIEF

35.

WHEREFORE, plaintiffs request judgment against the defendants for the following relief:

36.

Injunctive relief against the defendants, ordering them:

a. to permit JOHN STEIGERWALD and LAMB'S CHAPEL to use the SCHOOL DISTRICT's elementary school or high school auditoriums to show the Film Series.

b. to allow religious groups or political groups to use the facilities of the defendant SCHOOL DISTRICT without discrimination against them because of the religious content or political content of their speech.

37.

Plaintiffs further request declaratory relief against the defendants, stating that:

a. The defendants have created an open forum in the SCHOOL DISTRICT's elementary school and high school.

b. The defendants' refusal to allow plaintiffs to use the SCHOOL DISTRICT facilities for the Film Series is unconstitutional content discrimination against the speech and religious beliefs of the plaintiffs, which violates the plaintiffs' rights to freedom of speech, freedom of assembly, and 42 U.S.C. § 1983.

c. The defendants' refusal to allow use of the elementary school and or high school facilities, while rent-

ing to nonreligious or nonpolitical groups violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983.

d. The defendants' refusal to allow plaintiffs to use the SCHOOL DISTRICT's school facilities violates plaintiffs' rights under the Free Exercise Clause of the First and Fourteenth Amendments to the U.S. Constitution, and 42 U.S.C. § 1983.

e. a declaration that the current policy of defendant SCHOOL DISTRICT barring use of the elementary school or high school facilities for political or religious purposes is unconstitutional, as a violation of the Free Speech Clause, the Freedom of Assembly Clause, the Free Exercise Clause, the Establishment Clause and the Equal Protection Clause of the U.S. Constitution.

f. a declaration that barring the use of school facilities based upon the religious or political content of an individual's or group's speech pursuant to New York Education Law § 414 is unconstitutional, as a violation of the Free Speech Clause, the Freedom of Assembly Clause, the Establishment Clause and the Equal Protection Clause of the U.S. Constitution.

38.

For plaintiffs' reasonable attorneys' fees, as provided for by 42 U.S.C. § 1988.

39.

For Plaintiffs' costs and such other and further relief as the Court may deem just and right.

Dated: February 2, 1990.

By: s Mark Troobnick
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Case No. CV-90-0500

Judge Wexler

LAMB'S CHAPEL, and JOHN STEIGERWALD,
Plaintiffs,

- against -

CENTER MORICHES UNION FREE SCHOOL DISTRICT, and LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools,
Defendants.

ANSWER

The defendants, Center Moriches Union Free School District and Louise Tramontano in her official capacity as President of the Board of Education for the Center Moriches Union Free School District sued herein as President of the Board of Education for Center Moriches Schools, by their undersigned attorneys answer the Complaint herein as follows:

1. As to the allegations of paragraph 1 of the Complaint, defendants admit that the Center Moriches Union Free School District (hereinafter referred to as "CENTER MORICHES SCHOOL DISTRICT") has refused to permit John Steigerwald and Lamb's Chapel to use the facilities of CENTER MORICHES SCHOOL DISTRICT. The remaining allegations in paragraph 1 are conclusions of law which defendants neither admit nor deny.

2. Defendants admit that their actions are taken under color of State Law, in particular Section 414 of the Education Law of the State of New York. Defendants

deny each and every remaining allegation in paragraph 2.

3. The allegations of paragraph 3 of the Complaint are conclusions of law which defendants neither admit nor deny.

4. Defendants deny knowledge or information sufficient to form a belief as to the allegations in paragraph 5 of the Complaint.

5. Defendants deny knowledge or information sufficient to form a belief as to the allegations in paragraph 6 of the Complaint.

6. Defendants deny each and every allegation in paragraph 7 of the Complaint, except admit that CENTER MORICHES SCHOOL DISTRICT is organized and existing under the laws of the State of New York and operated under the direction of the Board of Education of the Center Moriches Union Free School District.

7. Defendants deny each and every allegation as contained in paragraph 8, except admit that Louise Tramontano is the President of the Board of Education for the Center Moriches Union Free School District.

8. Defendants deny each and every allegation as contained in paragraph 9, except admit that CENTER MORICHES SCHOOL DISTRICT has two auditoriums, one located at the elementary school and one located at the high school, plus other rooms and facilities for the purpose of providing education in accordance with the laws of the State of New York to the students of CENTER MORICHES SCHOOL DISTRICT.

9. Defendants deny each and every allegation as contained in paragraph 10 of the Complaint, except admit that CENTER MORICHES SCHOOL DISTRICT has "rules and regulations for community use of school facilities" and begs leave to refer to the text thereof.

10. Defendants deny each and every allegation as contained in paragraph 11 of the Complaint, except that requests have been received by CENTER MORICHES SCHOOL DISTRICT from Plaintiff, John Steigerwald, purportedly on behalf of Lamb's Chapel for use of school district facilities and that such use was denied pursuant to New York State Education Law Section 414.

11. Defendants deny each and every allegation as contained in paragraph 12 of the Complaint, except that requests have been received by CENTER MORICHES SCHOOL DISTRICT from Plaintiff, John Steigerwald, purportedly on behalf of Lamb's Chapel for use of school district facilities and that such use was denied pursuant to New York State Education Law Section 414.

12. Defendants deny each and every allegation as contained in paragraph 13 of the Complaint, except that requests have been received by CENTER MORICHES SCHOOL DISTRICT from Plaintiff, John Steigerwald, purportedly on behalf of Lamb's Chapel for use of school district facilities and that such use was denied pursuant to New York State Education Law Section 414.

13. Defendants deny each and every allegation as contained in paragraph 14 of the Complaint, except that requests have been received by CENTER MORICHES SCHOOL DISTRICT from Plaintiff, John Steigerwald, purportedly on behalf of Lamb's Chapel for use of school district facilities and that such use was denied pursuant to New York State Education Law Section 414.

14. There is no paragraph designated 15 of the Complaint.

15. Defendants deny each and every allegation as contained in paragraph 16 of the Complaint, except that requests have been received by CENTER MORICHES SCHOOL DISTRICT from Plaintiff, John Steigerwald, purportedly on behalf of Lamb's Chapel for use of school district facilities and that such use was denied pursuant to New York State Education Law Section 414.

16. Defendants deny each and every allegation as contained in paragraph 17 of the Complaint, except admit that use of the school facilities has been permitted in accordance with the CENTER MORICHES SCHOOL DISTRICT rules and regulations and in accordance with the provisions of Section 414 of the Education Law of the State of New York.

17. Defendants deny each and every allegation as contained in paragraph 18 of the Complaint.

18. Defendants deny each and every allegation as contained in paragraph 19 of the Complaint.

19. Defendants deny each and every allegation as contained in paragraph 20 of the Complaint.

20. Defendants deny each and every allegation as contained in paragraph 21 of the Complaint.

21. Defendants deny each and every allegation as contained in paragraph 22 of the Complaint.

22. Defendants repeat and reallege each and every allegation in response to paragraphs 1 through 17 in response to the allegations contained in paragraph 23 as if the same was set forth at length herein.

23. Defendants deny each and every allegation as contained in paragraph 24 of the Complaint.

24. Defendants deny each and every allegation as contained in paragraph 25 of the Complaint.

25. Defendants deny each and every allegation as contained in paragraph 26 of the Complaint.

26. Defendants repeat and reallege each and every response to the allegations contained in paragraphs 1 through 17 of the Complaint as if the same were set forth at length herein in response to the allegations as contained in paragraph 27 of the Complaint.

27. Defendants deny knowledge or information sufficient to form a belief as to the allegations as contained in paragraph 28 of the Complaint.

28. Defendants deny each and every allegation as contained in paragraph 29 of the Complaint.

29. Defendants deny each and every allegation as contained in paragraph 30 of the Complaint.

30. Defendants repeat and reallege each and every response to the allegations contained in paragraphs 1 through 17 as if the same were set forth at length herein in response to the allegations contained in paragraph 31 of the Complaint.

31. Defendants deny each and every allegation as contained in paragraph 32 of the Complaint.

32. Defendants deny each and every allegation as contained in paragraph 33 of the Complaint.

33. Defendants deny each and every allegation as contained in paragraph 34 of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

34. That the provisions of the First and Fourteenth Amendments to the United States Constitution prohibit any act of the defendant, CENTER MORICHES SCHOOL DISTRICT, which would establish or advance religion.

35. That, pursuant to the provisions of the First and Fourteenth Amendments of the United States Constitution, the State of New York has adopted Section 414 of the Education Law of the State of New York.

36. That the actions of the defendant, CENTER MORICHES SCHOOL DISTRICT, are taken pursuant to the provisions of Section 414 of the Education Law of the State of New York which grants authority to the Board of Education of the Center Moriches Union Free

School District to govern the use of school district premises for only certain limited purposes.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

37. That the provisions of the First and Fourteenth Amendments to the United States Constitution prohibit any act of the defendant, CENTER MORICHES SCHOOL DISTRICT, which would establish or advance religion.

38. That, pursuant to the provisions of the First and Fourteenth Amendments of the United States Constitution, the State of New York has adopted Section 414 of the Education Law of the State of New York.

39. That the actions of the Board of Education of the Center Moriches Union Free School District are taken pursuant to Section 414 of the Education Law of the State of New York which precludes the use school district premises for religious purposes.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

40. That the provisions of the First and Fourteenth Amendments to the United States Constitution prohibit any act of the defendant, CENTER MORICHES SCHOOL DISTRICT, which would establish or advance religion.

41. That, pursuant to the provisions of the First and Fourteenth Amendments of the United States Constitution, the State of New York has adopted Section 414 of the Education Law of the State of New York.

42. That the actions of CENTER MORICHES SCHOOL DISTRICT has not created an open forum.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

43. That the provisions of the First and Fourteenth Amendments to the United States Constituion prohibit

any act of the defendant, CENTER MORICHES SCHOOL DISTRICT, which would establish or advance religion.

44. That, pursuant to the provisions of the First and Fourteenth Amendments of the United States Constitution, the State of New York has adopted Section 414 of the Education Law of the State of New York.

45. That use of the school district facilities is controlled by the Board of Education of the Center Moriches Union Free School District.

AS AND FOR A FIFTH
AFFIRMATIVE DEFENSE

46. That the provisions of the First and Fourteenth Amendments to the United States Constitution prohibit any act of the defendant, CENTER MORICHES SCHOOL DISTRICT, which would establish or advance religion.

47. That, pursuant to the provisions of the First and Fourteenth Amendments of the Constitution, the State of New York has adopted Section 414 of the Education Law of the State of New York.

48. That it is a compelling government interest to protect the elementary and secondary school students of the State from proselytizing religious ideas of various religious groups and entities.

49. That it is the policy of the State of New York that elementary and secondary students be protected from proselytizing religious groups' use of school facilities as espoused by Section 414 of the Education Law of the State of New York.

AS AND FOR A SIXTH
AFFIRMATIVE DEFENSE

50. That the provisions of the First and Fourteenth Amendments to the United States Constitution prohibit

any act of the defendant, CENTER MORICHES SCHOOL DISTRICT, which would establish or advance religion.

51. That, pursuant to the provisions of the First and Fourteenth Amendments of the United States Constitution, the State of New York has adopted Section 414 of the Education Law of the State of New York.

52. That it is a compelling government interest to protect the elementary and secondary school students of the State from proselytizing religious ideas of various religious groups and entities.

53. That it is the policy of the State of New York that elementary and secondary students be protected from proselytizing religious groups' use of school facilities as espoused by Section 414 of the Education Law of the State of New York.

54. That pursuant to the provisions of Section 414 of the Education Law of the State of New York, the Center Moriches Board of Education has adopted Rules and Regulations to restrict the use of the facilities of the Center Moriches Union Free School District to those organizations which conform to the requirements and limitations set forth in Section 414 of the Education Law of the State of New York.

55. That any use of the facilities of the Center Moriches Union Free School District in violation of the Rules and Regulations was without the specific knowledge and consent of the Center Moriches Board of Education.

WHEREFORE, Defendants request judgment against the Plaintiff dismissing the Complaint, denying injunctive relief and denying declaratory relief and for Defendants' reasonable attorneys' fees as provided for by 42 U.S.C. Section 1988 and for Defendants' costs and such other and further relief as the Court may deem just and right.

Dated: March 5, 1990.

By: /s/ Harold G. Trabold
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Attorneys for the Defendants,
CENTER MORICHES UNION
FREE SCHOOL DISTRICT and
LOUISE TRAMONTANO as
President of the Board of
Education of the Center
Moriches Union Free
School District

PLAINTIFFS EXHIBIT 1a

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 6/15/88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Moriches Bay Power Squadron

TYPE OF ACTIVITY
Boating safety instruction

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	1	Library	
All Purpose Room		Auditorium	
Classroom	2	Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
To instruct boating public in safe boat handling, rules of the road, chart work

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
W.O. Admission Fee

* * * *

FOR OFFICE USE ONLY

Approved *	✔	
Disapproved		/s/ [Illegible]
Modified		Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

- PLAINTIFFS EXHIBIT 2a

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 8/29/88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Cub Scouts Pack 23

TYPE OF ACTIVITY
Cub Scouts

• • • •

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room	1	Auditorium	
Classroom		Fields	
Gymnasium	2	Other	

• • • •

PURPOSE (Give specific purpose)
Cub Scout Pack meetings

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
None

• • • •

FOR OFFICE USE ONLY

Approved * ✔
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a function being scheduled which must take priority.

PLAINTIFFS EXHIBIT 3

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF SEPTEMBER 19-25, 1988

MONDAY September 19, 1988	Girl Scout Parents Meeting C. M. Music Award Meeting Adult Volleyball	Elem. Cafeteria H. S. Music Rm. Main St. Gym	7:30-10:00 p.m. 8:00-9:30 p.m. 7:00-9:00 p.m.
TUESDAY September 20, 1988	Moriches Bay Power Squadron	Elem Cafeteria	7:30-10:00 p.m.
WEDNESDAY September 21		SCHOOLS CLOSED YOM KIPPUR	
THURSDAY September 22, 1988	Cub Scouts Pack 23 Board of Education	Elem. Gym Board Room	7:00-9:00 p.m. 7:30 p.m.
FRIDAY September 23, 1988			
SATURDAY September 24, 1988			
SUNDAY September 25, 1988			

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES
WEEK OF SEPTEMBER 26-OCTOBER 2, 1988

MONDAY	Adult Volleyball	Main St. Gym	7:00-9:00 p.m.
September 26, 1988	Suffolk County Girl Scout Registration	Cafeteria (Elem.)	7:30-9:00 p.m.
TUESDAY	Moriches Bay Power Squadron	Cafeteria (Elem)	7:30-10:00 p.m.
September 27, 1988	Boy Scout Troop 414	All Purpose Room	7:00-9:00 p.m.
WEDNESDAY	Brownie Troop 1721	Cafeteria A (Elem.)	6:00-7:00 p.m.
September 28, 1988	Men's Basketball	Main St. Gym	8:00-10:00 p.m.
	Moriches Bay Civic Association	All Purpose Room	8:00-10:30 p.m.
	Girls Basketball (5-6 grade)	Main St. Gym	5:30-6:30 p.m.
THURSDAY	Brownie Troop 1338	Elem Rm. 23	2:30-4:30 p.m.
September 29, 1988			
FRIDAY	St. John's Track & Field	H.S. Track	9:00-11:00 a.m.
September 30, 1988			
SATURDAY	Center Moriches Attack Soccer Club	H.S. Fields	12:00 a.m.-2:30 p.m.
October 1, 1988			
SUNDAY	Moriches Youth Organization	Elem. Main St. Gym	10:00 a.m.-1:00 p.m.
October 2, 1988			

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES
WEEK OF OCTOBER 3-9, 1988

MONDAY	Adult Volleyball	Main St. Gym	7:00-9:00 p.m.
October 3, 1988	G. S. Service Unit #65	Elem Cafe.	7:30-9:00 p.m.
	Suffolk Co. Girl Scouts Troop Registration	Elem. Cafe.	7:30-9:
TUESDAY	C. M. Music Award Assn. Opera Rehearsal	Elem. Music Room	7:00-9:00 p.m.
October 4, 1988	Moriches Bay Power Squadron	Elem. Cafe.	7:30-10:00 p.m.
	Boy Scout Troop 414	All Purpose Room	7:00-9:00 p.m.
WEDNESDAY	Brownie Troop #1721	Elem. Cafe.	6:00-7:00 p.m.
October 5, 1988	Men's Basketball	All Purpose Room	8:00-10:00 p.m.
	Girls Basketball Program (5th & 6th grade)	Main St. Gym	5:30-6:30 p.m.
THURSDAY	Brownie Troop 1338	Elem. Room 23	2:30-4:30 p.m.
October 6, 1988	Cub Scout Pack 23 Webelo	Elem. Cafe. A	7:00-8:30 p.m.
	PTA Executive Board Meeting	Elem. Faculty Room	7:30-10:00 p.m.
FRIDAY	Pep Rally	H. S. Gym	1:15-2:00 p.m.
October 7, 1988	Homecoming Parade	C. M. Fire Department	6:00 p.m.
	Bonfire	H.S. Grounds	7:00-10:00
SATURDAY	Homecoming Dance	H.S. Cafeteria	7:30-10:30 p.m.
October 8, 1988			
SUNDAY	Center Moriches Attck Soccer Club	H.S. Fields	12:00-2:30 p.m.
Octqber 9, 1988	Moriches Youth Organization	Main St. Gym	10:00 a.m.-1:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES
WEEK OF OCTOBER 17-23, 1988

MONDAY **October 17, 1988**	Adult Volleyball	Main St. Gym	7:00-9:00 p.m.
TUESDAY **October 18, 1988**	Daisy Scouts	Room 20 (Elem.)	3:00-4:00 p.m.
	C.M. Music Award Assn.	Elem. Music Room	7:00-9:00 p.m.
	Moriches Bay Power Squadron	Elem. Cafe.	7:30-10:00 p.m.
	Boy Scout Troop 414	All Purpose Room	7:00-9:00 p.m.
WEDNESDAY **October 19, 1988**	C.M.P.T.A.	Elem. Library	7:00-10:00 p.m.
	Men Basketball	Elem. All Purpose Rm.	8:00-10:00 p.m.
	Brownie Troop #1721	Elem. Cafe. A	6:00-7:00 p.m.
	Girls Basketball (5th & 6th grades)	Main St. Gym	5:30-6:30 p.m.
THURSDAY **October 20, 1988**	Brownie Troop #1338	Elem. Room 23	2:30-4:30 p.m.
	Cub Scouts Pack 23	Main St. Gym	7:00-8:30 p.m.
FRIDAY **October 21, 1988**			
SATURDAY **October 22, 1988**	St. John's Track and Field	H.S. Track Fields	9:00-11:00 p.m.
	Center Moriches Public Library	Elem. All Purpose Rm.	12:00-2:00 p.m.
	Union Meeting (Custodial Dept.)	Board Room	10:00 a.m.-12:00 p.m.
SUNDAY **October 23, 1988**	Women's Soccer	H.S. Fields	4:00-6:00 p.m.
	Center Moriches Attack Soccer Club	H.S. Fields	12:00-2:30 p.m.
	Morieches youth Organization	Main St. Gym	10:00-1:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES
WEEK OF OCTOBER 24-30, 1988

MONDAY **October 24, 1988**	Adult Volleyball	Main St. Gym	7:00-9:00 p.m.
TUESDAY **October 25, 1988**	Daisy Scouts	Elem. Room 20	3:00-4:00 p.m.
	C. M. Music Award Assn.	Elem. Music Room	7:00-9:45 p.m.
	Moriches Bay Power Squadron	Elem. Cafe.	7:30-10:00 p.m.
	Boy Scout Troop 414	All Purpose Room	7:00-9:00 p.m.
WEDNESDAY **October 26, 1988**	Brownie Troop #1721	Elem. Cafe. A	6:00-7:00 p.m.
	Suffolk County Girl Scouts Recruitment	Elem. Cafe. A	7:30-9:30 p.m.
	Men's Basketball	Elem. All Purpose Rm.	8:00-10:00 p.m.
	Girls' Basketball (5th and 6th grades)	Main St. Gym	5:30-6:30 p.m.
	Moriches Bay Civic Association	Elem Cafe. B	8:00-10:00 p.m.
THURSDAY **October 27, 1988**	Brownie Troop #1338	Elem. Room 23	2:30-4:30 p.m.
	Cub Scouts Pack 23 (Webelos)	Main St. Gym	7:00-8:30 p.m.
	Den Meeting-Cub Scout Pack 23	Main St. Gym	7:00-9:00 p.m.
FRIDAY **October 28, 1988**	Halloween Dance	H. S. Cafeteria	7:30-10:30 p.m.
SATURDAY **October 29, 1988**	St. John's Track and Field	H. S. Track Fields	9:00-11:00 a.m.
	Music Department Salvation Army Dinner and Concert	H. S. Cafeteria & Auditorium	5:00-10:00 p.m.
SUNDAY **October 30, 1988**	Women's Soccer	H. S. Fields	4:00-6:00 p.m.
	Center Moriches Attack Soccer Club	H. S. Fields	12:00-2:30 p.m.
	Moriches Youth Organization	Main St. Gym	10:00 a.m.-1:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES
WEEK OF OCTOBER 31-NOVEMBER 6, 1988

MONDAY October 31, 1988	Adult Volleyball Moriches Choral Society K-6 Halloween Parties	Main St. Gym Mr. Wegener's Room Cafeteria, All Purpose Room, Gym	7:00-9:00 p.m. 7:30-10:00 p.m. 6:00-8:00 p.m.
TUESDAY November 1, 1988	C.M. Music Award Assn. Rehearsals Moriches Bay Power Squadron Boy Scout Troop 414 Daisy Scouts	Elem. Music Room Elem. Cafeteria Elem. All Purpose Rm. Elem. Room 20	7:00-9:00 p.m. 7:30-10:00 p.m. 7:00-9:00 p.m. 3:00-4:00 p.m.
WEDNESDAY November 2, 1988	G. S. Brownie Troop #1721 Men's Basketball Grumman Basketball League	Elem. Cafeteria All Purpose Rm. Main St. Gym	6:00-7:00 p.m. 8:00-10:00 p.m. 8:00-10:00 p.m.
THURSDAY November 3, 1988	C.S. Brownie Troop #1338 Cub Scout Pack 23 Board of Education Workshop P.T.A. Executive Board	Elem. Room 23 Elem. Cafeteria Faculty Room Board Room	2:30-4:30 p.m. 7:00-8:30 p.m. 7:30-10:00 p.m. 7:00-10:00 p.m.
FRIDAY November 4, 1988			
SATURDAY November 5, 1988	S.A.T. Exams C.M. Youth Soccer (PAL) St. John's Track and Field	H.S. Gym H.S. Soccer Fields H.S. Track Fields	7:45 a.m.-12 Noon 4:00-6:00 p.m. 9:00-11:00 a.m.
SUNDAY November 6, 1988	Women's Soccer Center Moriches Attack Soccer Club Moriches Youth Organization Basketball C.M. Youth Soccer (PAL)	H.S. Fields H.S. Fields Main St. Gym H.S. Soccer Fields	4:00-6:00 p.m. 12:00-2:30 p.m. 10:00 a.m.-1:00 p.m. 1:00-5:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES
WEEK OF NOVEMBER 7.-13, 1988

MONDAY November 7, 1988	Adult Volleyball Moriches Choral Society S. C. Girl Scouts Service Unit 65	Main St. Gym H.S.-Mr. Wegener's Rm. Elem. Cafeteria	7:00-9:00 p.m. 7:30-10:00 p.m. 7:30-9:00 p.m.
TUESDAY November 8, 1988	ELECTION DAY Superintendent's Conference Day Daisy Scouts Moriches Bay Power Squadron C.M. Music Award Assn. Boy Scout Troop 414	Voting-Main St. Gym Room 20 Cafeteria B Elem. Music Room All Purpose Room	5:30 a.m.-9:00 p.m. 3:00-4:00 p.m. 7:30-10:00 p.m. 7:00-9:45 p.m. 7:00-9:00 p.m.
WEDNESDAY November 9, 1988	Grumman Basketball League Men's Basketball League C.M. Co-op Nursery School Brownie Troop #1721	Main St. Gym All Purpose Room Elem. Cafeteria Elem. Cafeteria A	8:00-10:00 p.m. 8:00-10:00 p.m. 7:30-9:30 p.m. 6:00-7:00 p.m.
THURSDAY November 10, 1988	Brownie Troop #1338 Cub Scouts Pack 23	Elem Room 23 Main St. Gym	2:30-4:30 p.m. 7:00-8:30 p.m.
FRIDAY November 11, 1988	VETERANS DAY Schools Closed		
SATURDAY November 12, 1988	C. M. Youth Soccer	H.S. Soccer Fields	4:00-6:00 p.m.
SUNDAY November 13, 1988	C. M. Youth Soccer Women's Soccer C.M. Attack Soccer	H.S. Soccer Fields H.S. Soccer Fields H.S. Soccer Fields	1:00-5:00 p.m. 4:00-6:00 p.m. 12:00-2:30 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF NOVEMBER 21-27, 1988

MONDAY November 21, 1988	Adult Volleyball Moriches Choral Society	Main St. Gym H.S.-Mr. Wegener's Rm.	7:00-9:00 p.m. 7:30-10:00 p.m.
TUESDAY November 22, 1988	Daisy Scouts Moriches Bay Power Squadron C. M. Music Award Opera Rehearsals	Elem. Room 20 Elem. Cafe. B H. S. Auditorium	3:00-4:00 p.m. 7:30-10:00 p.m. 7:00-10:00 p.m.
WEDNESDAY November 23, 1988	Grumman Basketball League Brownie Troop #1721	Main St. Gym Elem. Cafe. A	8:00-10:00 p.m. 6:00-7:00 p.m.
THURSDAY November 24, 1988	HAPPY THANKSGIVING! Schools Closed		
FRIDAY November 25, 1988			
SATURDAY November 26, 1988			
SUNDAY November 27, 1988	Women's Soccer	H.S. Fields	4:00-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF NOVEMBER 28-DECEMBER 4, 1988

MONDAY November 28, 1988	Adult Volleyball Moriches Choral Society	Main St. Gym H.S.-Mr. Wegener's Rm.	7:00-9:00 p.m. 7:30-10:00 p.m.
TUESDAY November 29, 1988	Daisy Scouts Moriches Bay Power Squadron C.M. Music Award Assn Boy Scouts Troop 414	Elem. Room 20 Elem. Cafe. B H.S. Stage All Purpose Room	3:00-4:00 p.m. 7:30-10:00 p.m. 7:00-10:00 p.m. 7:00-9:00 p.m.
WEDNESDAY November 30, 1988	Grumman Basketball League Men's Basketball League Brownie Troop #1721 CM Nursery School (Quilting)	Main St. Gym All Purpose Room Elem. Cafe. A Elem. Cafe B	2:30-4:30 p.m. 7:00-9:00 p.m. 6:00-7:00 p.m. 7:30-9:30 p.m.
THURSDAY December 1, 1988	Brownie Troop #1338 Cub Scouts Pack 23 PTA Executive Board Mtg. JV Boys Basketball	Elem. Room 23 Main St. Gym Board Room Main St. Gym	2:30-4:30 p.m. 7:00-8:30 p.m. 7:30-10:00 p.m. 5:30-7:30 p.m.
FRIDAY December 2, 1988	C.W. Post Internship Mtg.	Board Room	3:30-5:00 p.m.
SATURDAY December 3, 1988	MYO Boys & Girls Basketball	Main St. Gym	9:00 a.m.-3:00 p.m.
SUNDAY December 4, 1988	Women's Soccer (Last Day) MYO Basketball	H. S. Soccer Fields Main St. Gym	4:00-6:00 p.m. 10:00 a.m.-1:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF DEC. 5-11, 1988

MONDAY December 5, 1988	Adult Volleyball	Main St. Gym	7:00-9:00 p.m.
	Moriches Choral Society	H.S.-Mr. Wegener's Rm.	7:30-10:00 p.m.
	C. M. Music Assn. Opera Rehearsal	H.S. Auditorium	6:00-10:00 p.m.
	S. C. Girl Scout Service Unit	Elem. Cafe.	7:00-9:00 p.m.
TUESDAY December 6, 1988	Daisy Scouts	Elem. Room 20	3:00-4:00 p.m.
	Moriches Bay Power Squadron	Elem. Cafe. B	7:30-10:00 p.m.
	C. M. Music Award Assn. Rehearsal	H.S. Auditorium	6:00-10:00 p.m.
	Boy Scouts Troop 414	All Purpose Room	7:00-9:00 p.m.
	C.M.P.T.A. Meeting	Elem. Library	7:30-10:00 p.m.
WEDNESDAY December 7, 1988	Grumman Basketball League	Main St. Gym	2:30-4:30 p.m.
	Men's Basketball League	All Purpose Room	7:00-9;00 p.m.
	Brownie Troop #1721	Elem Cafe. A	6:00-7:00 p.m.
	C. M. Music Assn Opera Rehearsal	H. S. Auditorium	6:00-10:00 p.m.
THURSDAY December 8, 1988	Brownie Troop #1338	Elem Room 23	2:30-4:30 p.m.
	Cub Scouts Pack 23 Webelos	Main St. Gym	7:00-8:30 p.m.
	C. M. Music Assn. Opera Rehearsal	H. S. Auditorium	6:00-10:00 p.m.
FRIDAY December 9, 1988	"AMAHL & THE NIGHT VISITORS" Performed by C. M. Music Award Assn.	H. S. Auditorium	8:00 p.m.
SATURDAY December 10, 1988	"AMAHL & THE NIGHT VISITORS" Performed by C. M. Music Award Assn.	H. S. Auditorium	8:00 p.m.
	M.Y.O. Boys & Girls Basketball	Main St. Gym	9:00 a.m.-3:00 p.m.
SUNDAY	M.Y.O. Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF DECEMBER 12-18, 1988

MONDAY December 12, 1988	S. C. Girl Scout Service Unit Cookie Training	Elem. Cafe	7:00-9:30 p.m.
	Moriches Choral Society	H.S. Mr. Wegener's Rm.	7:30-10:00 p.m.
TUESDAY December 13, 1988	Daisy Scouts	Elem. Room 20	3:00-4:00 p.m.
	Moriches Bay Power Squadron (Last Mtg.)	Elem. Cafe. B	7:30-10:00 p.m.
	Boy Scout Troop 414	All Purpose Room	7:00-9:00 p.m.
	Board of Education	Board Room	7:30 p.m.
WEDNESDAY December 14, 1988	Men's Basketball	All Purpose Room	8:00-10:00 p.m.
	Brownie Troop #1721	Elem. Cafe. A	6:00-7:00 p.m.
THURSDAY December 15, 1988	Brownie Troop #1338	Elem. Room 23	2:30-4:30 p.m.
	Cub Scouts Pack 23 Webelos	All Purpose Room	7:00-8:30 p.m.
FRIDAY December 16, 1988	Class of 88 Christmas Dance	H. S. Cafeteria	7:30-10:30 p.m.
SATURDAY December 17, 1988			
SUNDAY December 18, 1988			

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF DECEMBER 19-25, 1988

MONDAY December 19, 1988	Moriches Choral Society	H. S. Mr. Wegener's Rm.	7:30-10:00 p.m.
TUESDAY December 20, 1988	Daisy Scouts Boy Scout Troop 414	Elem Room 20 All Purpose Room	3:00-4:00 p.m. 7:00-9:00 p.m.
WEDNESDAY December 21, 1988	Men's Basketball Brownie Troop #1721 "RUDOLF'S DISASTER" An Operetta Clayton Huey Elem. Chorus & Band	All Purpose Room Elem. Cafe. A H.S. Auditorium	8:00-10:00 p.m. 6:00-7:00 p.m. 7:30-9:00 p.m.
THURSDAY December 22, 1988	Brownie Troop #1338 Cub Scouts Pack 23 Webelos	Elem. Room 23 All Purpose Room	2:30-4:30 p.m. 7:00-8:30 p.m.
FRIDAY December 23, 1988			
SATURDAY December 24, 1988			
SUNDAY December 25, 1988	MERRY CHRISTMAS ! ! !		

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF JANUARY 9-15, 1989

MONDAY January 9, 1989	Adult Volleyball S. C. Girl Scout Service Unit	Main St. Gym Elem. Cafe	7:00-9:00 p.m. 7:30-9:00 p.m.
TUESDAY January 10, 1989	Daisy Girl Scouts B. S. A. Troop 414 Unkechaug Dance Group Rehearsal	Elem. Room 20 All Purpose Room Elem. Cafe.	3:00-4:00 p.m. 7:00-9:00 p.m. 7:30-10:00 p.m.
WEDNESDAY January 11, 1989	Grumman Basketball Brownie Troop 1721	Main St. Gym Elem. Cafe. A.	8:00-10:00 p.m. 6:00-7:00 p.m.
THURSDAY January 12, 1989	C.M. Cooperative Nursery School Brownie Troop 1338 Cub Pack 23 Webelos	Elem. Cafe. B Elem. Room 23 Main St. Gym	7:00-10:00 p.m. 2:30-4:30 p.m. 7:00-8:30 p.m.
FRIDAY January 13, 1989	Jr. H. S. Student Council Winter Cotillion	H. S. Cafeteria	7:30-10:30 p.m.
SATURDAY January 14, 1989	Moriches Youth Organization Boys & Girls Basketball	Main St. Gym	9:00 a.m.-3:00 p.m.
SUNDAY January 15, 1989	Moriches Youth Organization Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF FEBRUARY 6-12, 1989

MONDAY February 6, 1989	Adult Volleyball S. C. Girl Scout Service Unit	Elem. Cafe	7:30-9:00 p.m.
TUESDAY February 7, 1989	Daisy Girl Scouts B.S.A. Troop 414	Elem. Room 20 All Purpose Room	3:00-4:00 p.m. 7:00-9:00 p.m.
WEDNESDAY February 8, 1989	Grumman Basketball Brownie Troop 1721 Men's Basketball	Main St. Gym Elem. Cafe. A All Purpose Room	8:00-10:00 p.m. 6:00-7:00 p.m. 8:00-10:00 p.m.
THURSDAY February 9, 1989	C. M. Music Award Assn. Chines Auction Skate for Heart C.M. Nursery Quilting Project Cub Pack 23 Webelows CMPTA	H.S. Cafeteria Main St. Gym Elem. Cafeteria Main St. Gym Elem. Library	7:00-10:00 p.m. 2:45-4:45 p.m. 7:00-9:30 p.m. 7:00-8:30 p.m. 7:30-10:00 p.m.
FRIDAY February 10, 1989	Jump for Heart	Main St. Gym	2:45-4:45 p.m.
SATURDAY February 11, 1989	Moriches Youth Organization Boys & Girls Basketball MYO Special Soccer and Basketball	Main St. Gym Main St. Gym	9:00 a.m.-3:00 p.m. 4:00-6:00 p.m.
SUNDAY February 12, 1989	MYO Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF FEBRUARY 13-19, 1989

MONDAY February 13, 1989	Adult Volleyball	Elem. Cafe.	7:30-9:00 p.m.
TUESDAY February 14, 1989	Daisy Girl Scouts Boy Scouts Troop 414 Elem. Valentine's Dance	Elem. Room 20 All Purpose Room All Purpose Room	3:00-4:00 p.m. 7:00-9:00 p.m. 5:00-7:00 p.m.
WEDNESDAY February 15, 1989	Grumman Basketball Brownie Troop 1721 6th Grade Washington D.C. Trip Mtg. Board of Education Regular Meeting	Main St. Gym Elem. Cafe. A All Purpose Room Board Room	8:00-10:00 p.m. 6:00-7:00 p.m. 7:30 p.m. 7:30 p.m.
THURSDAY February 16, 1989	Cub Pack 23 Webelos	Main St. Gym	7:00-8:30 p.m.
FRIDAY February 17, 1989	Valentines' Day Dance	H.S. Cafeteria	7:30-10:30 p.m.
SATURDAY February 18, 1989	Moriches Youth Organization Boys & Girls Basketball MYO Special Soccer and Basketball	Main St. Gym Main St. Gym	9:00 a.m.-3:00 p.m. 4:00-6:00 p.m.
SUNDAY February 19, 1989	MYO Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF MARCH 6-12, 1989

MONDAY March 6, 1989	Adult Volleyball Suffolk County Girl Scouts Service Unit	Main St. Gym Cafeteria	7:30-9:00 p.m. 7:30-9:00 p.m.
	WINGS PROGRAM - ELEM. SCHOOL - MARCH 6-17, 1989		
TUESDAY March 7, 1989	Daisy Girl Scouts Boy Scouts Troop 414 Men's Basketball Jr. H. S. Parents Mtgs H. S. Faculty Meeting	Elem. Room 20 All Purpose Room Main St. Gym H. S. Library H. S. Auditorium	3:00-4:00 p.m. 7:00-9:00 p.m. 7:30-10:00 p.m. 3:00-4:00 p.m. 7:30-8:30 p.m. 2:15-3:40 p.m.
WEDNESDAY March 8, 1989	Grumman Basketball Brownie Troop 1721	Main St. Gym Elem. Cafe. A	8:00-10:00 p.m. 6:00-7:00 p.m.
THURSDAY March 9, 1989	Cub Pack 23 Webelos	Main St. Gym	7:00-8:30 p.m.
FRIDAY March 10, 1989	C.M.P.T.A.-Book Fair	H. S. Main Lobby	10:30 a.m.-1:00 p.m.
SATURDAY March 11, 1989	Moriches Youth Organization Boys & Girls Basketball MYO Special Soccer & Basketball	Main St. Gym Main St. Gym	9:00 a.m.-3:00 p.m. 4:00-6:00 p.m.
SUNDAY March 12, 1989	MYO Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF MARCH 13-19, 1989

MONDAY March 13, 1989	Adult Volleyball Suffolk County Girl Scouts Service Unit	Main St. Gym Cafeteria	7:30-9:00 p.m. 7:30-9:00 p.m.
	WINGS PROGRAM - ELEMENTARY SCHOOL - MARCH 13-17, 1989		
TUESDAY March 14, 1989	Daisy Girl Scouts Boy Scouts Troop 414 Men's Backetball C.M.P.T.A. Book Fair	Elem. Room 20 All Purpose Room Main St. Gym H.S. Main Lobby	3:00-4:00 p.m. 7:00-9:00 p.m. 7:30-10:00 p.m. 10:30 a.m.-1:00 p.m.
WEDNESDAY March 15, 1989	Grumman Basketball Brownie Troop 1721 C.M.P.T.A. Book Fair	Main St. Gym Elem. Caf. A H.S. Main Lobby	8:00-10:00 p.m. 6:00-7:00 p.m. 10:30 a.m.-1:00 p.m.
THURSDAY March 16, 1989	Brownie Troop 1338 Cub Pack 23 Webelos Music Dept. Winter Band Concert	Elem. Room 23 Main St. Gym H.S. Auditorium	2:30-4:30 p.m. 7:00-8:30 p.m. 7:00-10:00 p.m.
FRIDAY March 17, 1989	Jr. High Student Council Dance	H.S. Caf.	7:30-10:30 p.m.
SATURDAY March 18, 1989	Moriches Youth Organization Boys & Girls Basketball MYO Special Soccer & Basketball Class of '89 Car Wash	Main St. Gym Main St. Gym Elem. Parking Lot	9:00 a.m.-3:00 p.m. 4:00-6:00 p.m. 9:00 a.m.-3:00 p.m.
SUNDAY March 19, 1989	MYO Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF MARCH 20-26, 1989

MONDAY March 20, 1989	Adult Volleyball Suffolk County Girl Scouts Serv. Unit PE Dept. Movement Ed. Stations	Main St. Gym Cafeteria All purpose room	7:30-9:00 p.m. 7:30-9:00 p.m. all day
TUESDAY March 21, 1989	Daisy Girl Scouts Boy Scouts Troop 414 Men's Basketball PE Dept. Movement Ed. Stations	Elem. Room 20 Elem. Cafeteria Main St. Gym All purpose room	3:00-4:00 p.m. 7:00-9:00 p.m. 7:30-10:00 p.m. all day
WEDNESDAY March 22, 1989	Grumman Basketball Brownie Troop 1721 PE Dept. Movement Ed. Stations DECA/FBLA Easter Dinner	Main St. Gym Elem. Caf. A All purpose room H.S. Cafeteria	8:00-10:00 p.m. 6:00-7:00 p.m. all day 6:00-8:00 p.m.
THURSDAY March 23, 1989	SCHOOLS CLOSED		
FRIDAY March 24, 1989	SCHOOLS CLOSED		
SATURDAY March 25, 1989	Moriches Youth Organization Boys & Girls Basketball MYO Special Soccer & Basketball	Main St. Gym Main St. Gym	9:00 a.m.-3:00 p.m. 4:00-6.00 p.m.
SUNDAY March 26, 1989	MYO Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES
WEEK OF MARCH 27-APRIL 2, 1989

MONDAY March 27, 1989	Adult Volleyball Suffolk County Girl Scouts Serv. Unit PE Dept. Movement Ed. Stations	Main St. Gym Cafeteria All purpose room	7:30-9:00 p.m. 7:30-9:00 p.m. all day
TUESDAY March 28, 1989	Daisy Girl Scouts Boy Scouts Troop 414 Men's Basketball PE Dept. Movement Ed. Stations Junior High Honor Society Ceremony	Elem. Room 20 Elem. Cafeteria Main St. Gym All purpose room HS Library	3:00-4:00 p.m. 7:00-9:00 p.m. 7:30-10:00 p.m. all day 7:00-9:30 p.m.
WEDNESDAY March 29, 1989	Grumman Basketball Brownie Troop 1721 PE Dept. Movement Ed. Stations Special Board Meeting	Main St. Gym Elem. Caf. A All purpose room Board room	8:00-10:00 p.m. 6:00-7:00 p.m. all day 8:00 p.m. Public 8:30 p.m. Executive
THURSDAY March 30, 1989	Brownie Troop 1338 Cub Pack 23 Webelos PE Dept. Movement Ed. Stations Intern Seminar Meeting	Elem. room 23 Gym 1 All Purpose room Board room	2:30-4:30 p.m. 7:00-8:30 p.m. all day 4:00-6:00 p.m.
FRIDAY March 31, 1989	PE Dept. Movement Ed. Stations PTA Prime time	All purpose room Cafeteria/ All purpose room	all day 6:00-9:30 p.m.
SATURDAY April 1, 1989	Moriches Youth Organization Boys & Girls Basketball MYO Special Soccer & Basketball	Main St. Gym Main St. Gym	9:00 a.m.-3:00 p.m. 4:00-6:00 p.m.
SUNDAY April 2, 1989	MYO Basketball LI Womens Soccer	Main St. Gym H.S. Fields	10:00 a.m.-1:00 p.m. 3:30-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF APRIL 3-9, 1989

MONDAY April 3, 1989	Suffolk County Girl Scouts Serv. Unit PE Dept. Movement Ed. Stations	Cafeteria All purpose room	7:30-9:00 p.m. all day
TUESDAY April 4, 1989	Science Exhibit Daisy Girl Scouts Boys Scouts Troop 414 PE Dept. Movement Ed. Stations	Main St. Gym Elem. Room 20 Elem. Cafeteria All purpose room	7:00-8:30 p.m. 3:00-4:00 p.m. 7:00-9:00 p.m. all day
WEDNESDAY April 5, 1989	Grumman Basketball Brownie Troop 1721 PE Dept. Movement Ed. Stations	Main St. Gym Elem. Caf. A All purpose room	8:00-10:00 p.m. 6:00-7:00 p.m. all day
THURSDAY April 6, 1989	Brownie Troop 1338 Cub Pack 23 Webelos PE Dept. Movement Ed. Stations P.T.A. Executive Board Meeting	Elem. room 23 Gym 1 All purpose room Board room	2:30-4:30 p.m. 7:00-8:30 p.m. all day 7:30-10:00 p.m.
FRIDAY April 7, 1989	PE Dept. Movement Ed. Stations Sophomore/Freshman class dance	All purpose room H.S. cafeteria	all day 7:00-11:00 p.m
SATURDAY April 8, 1989	MYO Special Soccer & Basketball	Main St. Gym	4:00-6:00 p.m.
SUNDAY April 9, 1989	MYO Basketball LI Womens Soccer	Main St. Gym H.S. Fields	10:00 a.m.-1:00 p.m. 3:30-6:00 p.m.

PLAINTIFFS EXHIBIT 4

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF SEPTEMBER 11-17, 1989

MONDAY September 11, 1989	Adult Volleyball	Main St. Gym	7:00-9:00 p.m.
TUESDAY September 12, 1989	Moriches Bay Power Squadron Boy Scout Troop 414 Primary Election	Elem. Cafe. All purp. rm Main St. Gym	7:30-10:00 p.m. 7:30-9:00 p.m. 6:00 a.m.-9:00
WEDNESDAY September 13, 1989	CM Girl's Basketball	Main St. Gym	5:30-6:30 p.m.
THURSDAY September 14, 1989	Moriches Bay Power Squadron PTA Exec. bd. mtg. Adm. Internship	Elem. Cafe. Board rm Board rm.	7:30-10:00 p.m. 7:30-10:00 p.m. 4:00 p.m.
FRIDAY September 15, 1989			
SATURDAY September 16, 1989			
SUNDAY September 17, 1989	LI Womens Soccer	HS Soccer Field	3:30-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF SEPTEMBER 18-24, 1989

MONDAY September 18, 1989	Adult Volleyball SC Girl Scouts Parent Mtg. Special Board of Ed. Mtg.	Main St. Gym Elem. Cafe. Board Room	7:00-9:00 p.m. 7:00-9:00 p.m. Exec. 6:00 p.m.
TUESDAY September 19, 1989	Moriches Bay Power Squadron Boy Scout Troop 414 SEPTA Gen. Mtg. C.M. Basketball	Elem. Cafe. All Purp. Rm. Elem. Lib. Main St. Gym	7:30-10:00 p.m. 7:30-9:00 p.m. 8:00-10:00 p.m. 7:00-10:00 p.m.
WEDNESDAY September 20, 1989	C.M. Girl's Basketball Board of Education Mtg.	Main St. Gym Board Room	5:30-6:30 p.m. Exec. 6:00 p.m. Pub. 7:30 p.m.
THURSDAY September 21, 1989	Moriches Bay Power Squadron Men's Adult Basketball Special Board of Ed. Mtg.	Elem. Cafe. Main St. Gym Board Room	7:30-10:00 p.m. 7:00-9:30 p.m. Exec. 6:00 p.m.
FRIDAY September 22, 1989			
SATURDAY September 23, 1989	CMHS 8th Gr. Car Wash	Elem. Parking Lot	9:00 a.m.-1:00 p.m.
SUNDAY September 24, 1989	LI Women Soccer	H.S. Soccer Field	3:30-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF SEPTEMBER 25-OCTOBER 1, 1989

MONDAY September 25, 1989	Adult Volleyball SC Girl Scouts Reg. Mtg.	Main St. Gym Elem. Cafe.	7:00-9:00 p.m. 7:30-9:00 p.m.
TUESDAY September 26, 1989	SC Girls Scouts Daisy Troop #633 Moriches Bay Power Squadron B.S.A. Troop 414 CM Res. Basketball	All Purp. Rm. Elem. Cafe. All Purp. Rm. Main St. Gym	3:15-4:15 p.m. 7:30-10:00 p.m. 7:30-9:00 p.m. 7:00-10:00 p.m.
WEDNESDAY September 27, 1989	CM Girl's Basketball SC Girl Scouts Brownie Troop 1338	Main St. Gym All Purp. Rm.	5:30-6:30 p.m. 2:30-4:00 p.m.
THURSDAY September 28, 1989	Men's Adult Basketball BSA Cub Pack 23 Moriches Bay Power Squadron	Main St. Gym All Purp. Rm. Elem. Cafe.	7:00-9:30 p.m. 7:00-9:00 p.m. 7:30-10:00 p.m.
FRIDAY September 29, 1989			
SATURDAY September 30, 1989	MYO Basketball	Main St. Gym	10:00 a.m.-4:00 p.m.
SUNDAY October 1, 1989	MYO Basketball LI Women Soccer	Main St. Gym HS Soccer Field	10:00 a.m.-2:00 p.m. 3:30-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF OCTOBER 9-15, 1989

MONDAY October 9, 1989	SCHOOL CLOSED		
TUESDAY October 10, 1989	SC Girl Scouts Daisy Troop #633	Room 23	3:15-4:15 p.m.
	Moriches Bay Power Squadron	Elem. Cafe.	7:30-10:00 p.m.
	BSA Troop 414	All purpose rm.	7:30-9:00 p.m.
	CM Res. Basketball	Main St. Gym	7:00-10:00 p.m.
	SEPTA Board meeting	Elem. Teachers rm.	8:00-10:00 p.m.
WEDNESDAY October 11, 1989	CM Girl's Basketball	Main St. Gym	5:30-6:30 p.m.
	Grumman Basketball	Main St. Gym	7:30-9:30 p.m.
	SC Girl Scout Troop #1338	Room 23	2:30-4:00 p.m.
THURSDAY October 12, 1989	Men's Adult Basketball	Main St. Gym	7:00-9:30 p.m.
	PTA General Meeting	Elem. Library	7:30-10:00 p.m.
	Cub Pack 23 Webelos	All purpose rm.	7:00-9:00 p.m.
	Moriches Bay Power Squadron	Elem. Cafe.	7:30-10:00 p.m.
FRIDAY October 13, 1989			
SATURDAY October 14, 1989	Home-Coming Dance	HS Cafe.	7:30-10:30 p.m.
	MYO Basketball	Main St. Gym	10:00 a.m.-4:00 p.m.
	CM Nursery School Fall Festival	Elem. Front Lawn	10:00 a.m.-5:00 p.m.
SUNDAY October 15, 1989	Mastic Soccer Club	HS Fields	4:00-7:00 p.m.
	LI Women's Soccer	HS Fields	3:30-6:00 p.m.
	MYO Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF OCTOBER 16-22, 1989

MONDAY October 16, 1989	Movement Ed. Stations	All purpose room	All Day
	Adult Volleyball	Main St. Gym	7:00-9:00 p.m.
	SC Girl Scouts Brownie Mtg.	Room 23	2:30-4:00 p.m.
TUESDAY October 17, 1989	SC Girl Scouts Daisy Troop #633	Room 23	3:15-4:15 p.m.
	Moriches Bay Power Squadron	Room 17 (art rm.)	7:30-10:00 p.m.
	SEPTA Meeting	All purpose rm.	7:30-10:00 p.m.
	CM Res. Basketball	Main St. Gym	7:00-10:00 p.m.
	Movement Ed. Stations	All purpose rm.	All Day
	BSA Troop 414	Elem. Cafe.	7:30-9:00 p.m.
WEDNESDAY October 18, 1989	CM Girl's Basketball	Main St. Gym	5:30-6:30 p.m.
	Grumman Basketball	Main St. Gym	7:30-9:30 p.m.
	SC Girl Scout Troop #1338	Rm. 23	2:30-4:00 p.m.
	Movement Ed. Stations	All purpose rm.	All Day
	Board of Education Mtg.	Board Room	Exec. 6:00 p.m. Public 7:30 p.m.
THURSDAY October 19, 1989	Moriches Bay Power Squadron	Room 17 (art room)	7:30-10:00 p.m.
	Jr. Girl Scout Troop #176	Main St. Gym	7:00-8:30 p.m.
	Cub Pack 23 Webelos	Elem. Cafe.	7:00-9:00 p.m.
	Movement Ed. Stations	All purpose rm.	All Day
FRIDAY October 20, 1989	Movement Ed. Stations	All purpose rm.	All Day
SATURDAY October 21, 1989	MYO Basketball	Main St. Gym	10:00 a.m.-4:00 p.m.
SUNDAY October 22, 1989	Mastic Soccer Club	HS Soccer Fields	4:00-7:00 p.m.
	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.
	LI Women's Soccer	HS Soccer Fields	3:30-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES
WEEK OF OCTOBER 23-29, 1989

MONDAY October 23, 1989	Movement Ed. Stations	All purpose room	All Day
	Adult Volleyball	Main St. Gym	7:00-9:00 p.m.
	SC Girl Scouts Brownie Mtg.	Room 23	2:30-4:00 p.m.
	Moriches Choral Society Rehearsal	HS Band Room	7:30-10:00 p.m.
TUESDAY October 24, 1989	SC Girl Scouts Daisy Troop #633	Room 23	3:15-4:15 p.m.
	Moriches Bay Power Squadron	Room 17 (art room)	7:30-10:00 p.m.
	CM Res. Basketball	Main St. Gym	7:00-10:00 p.m.
	Movement Ed. Stations	All purpose room	All Day
	BSA Troop 414	Elem. Cafe.	7:30-9:00 p.m.
WEDNESDAY October 25, 1989	CM Girl's Basketball	Main St. Gym	5:30-6:30 p.m.
	Grumman Basketball	Main St. Gym	7:30-9:30 p.m.
	SC Girl Scout Troop #1338	Room 23	2:30-4:00 p.m.
	Movement Ed. Stations	All purpose room	All Day
	Board of Ed. Special Mtg.	Board Room	6:00 p.m.
THURSDAY October 26, 1989	Moriches Bay Power Squadron	Room 17 (art room)	7:30-10:00 p.m.
	Cub Pack 23 Pack Night	Main St. Gym	6:30-9:30 p.m.
	Movement Ed. Stations	All purpose room	All Day
FRIDAY October 27, 1989	Jr. HS Halloween Dance	HS Cafe.	8:00-11:00 p.m.
	Movement Ed. Stations	All purpose room	All Day
SATURDAY October 28, 1989	MYO Basketball	Main St. Gym	10:00 a.m.-4:00 p.m.
SUNDAY October 29, 1989	Mastic Soccer Club	HS Soccer Fields	4:00-7:00 p.m.
	LI Women's Soccer	HS Soccer Fields	3:30-6:00 p.m.
	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES
WEEK OF OCTOBER 30-NOVEMBER 5, 1989

MONDAY October 30, 1989	Movement Ed. Stations	All Purpose room	All Day
	Adult Volleyball	Main St. Gym	7:00-9:00 p.m.
	SC Girl Scouts Brownie Mtg.	Room 23	2:30-4:00 p.m.
	Moriches Choral Society Rehearsal	HS Band room	7:30-10:00 p.m.
TUESDAY October 31, 1989	CM PTA Halloween Party	Main St. Gym/Cafe/ All Purpose room	6:00-8:30 p.m.
	SC Girl Scouts Daisy Troop #633	Room 23	3:15-4:15 p.m.
	Moriches Bay Power Squadron	Room 17 (Art room)	7:30-10:00 p.m.
	Movement Ed. Stations	All purpose room	All Day
WEDNESDAY November 1, 1989	CM Girl's Basketball	Main St. Gym	5:30-6:30 p.m.
	Grumman Basketball	Main St. Gym	7:30-9:30 p.m.
	SC Girl Scout Troop #1338	Room 23	2:30-4.00 p.m.
	Movement Ed. Stations	All purpose room	All Day
	Board of Ed. Workshop	Board room	Exec. 7:30-8:30 p.m. Pub. 8:30 p.m.
THURSDAY November 2, 1989	Moriches Bay Power Squadron	Room 17 (Art room)	7:30-10:00 p.m.
	Jr. Girl Scouts	Main St. Gym	6:30-8:00 p.m.
	PTA Exec. Mtg.	Board room	7:30-10:00 p.m.
	Cub Pack 23	Elem Cafe.	7:00-9:00 p.m.
	Movement Ed. Stations	All purpose room	All Day
FRIDAY November 3, 1989	Movement Ed. Stations	All purpose room	All Day
SATURDAY November 4, 1989	St. John Track	HS Fields	9:00-11:00 a.m.
	CM Youth Soccer (East End PAL)	HS Fields	10:00 a.m.-4:00 p.m.
	MYO Basketball	Main St. Gym	10:00 a.m.-4:00 p.m.
SUNDAY November 5, 1989	Mastic Soccer Club	HS Soccer Fields	4:00-7:00 p.m.
	LI Women's Soccer	HS Soccer Fields	3:30-6:00 p.m.
	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES
WEEK OF NOVEMBER 6-12, 1989

MONDAY November 6, 1989	School Closed		
TUESDAY November 7, 1989	School Closed		
WEDNESDAY November 8, 1989	CM Girl's Basketball	Main St. Gym	5:30-6:30 p.m.
	Grumman Basketball	Main St. Gym	7:30-9:30 p.m.
	SC Girl Scout Troop #1338	Room 23	2:30-4:00 p.m.
	Movement Ed. Stations	All purpose room	All Day
THURSDAY November 9, 1989	Men's Adult Basketball	Main St. Gym	7:00-9:30 p.m.
	PTA General Meeting	Elem. Lib./Comp. Lab	7:30-10:00 p.m.
	Cub Pack 23	Elem. Cafe.	7:00-9:00 p.m.
	Movement Ed. Stations	All purpose room	All Day
FRIDAY November 10, 1989	Movement Ed. Stations	All purpose room	All Day
SATURDAY November 11, 1989	B.A.D.	HS Gym/Cafe.	7:00 a.m.-7:00 p.m.
	CM Youth Soccer (East End PAL)	HS Fields	10:00 a.m.-4:00 p.m.
	MYO Basketball	Main St. Gym	10:00 a.m.-4:00 p.m.
SUNDAY November 12, 1989	Mastic Soccer Club	HS Soccer Fields	4:00-7:00 p.m.
	LI Women's Soccer	HS Soccer Fields	3:30-6:00 p.m.
	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES
WEEK OF NOVEMBER 13-19, 1989

MONDAY November 13, 1989	CM Athletic Booster Club	HS Cafe.	7:30-9:30 p.m.
	Adult Volleyball	Main St. Gym	7:00-9:00 p.m.
	SC Girl Scouts Adult Mtg.	Elem. Cafe.	7:30-9:00 p.m
	SC Girl Scouts Brownie Mtg.	Room 23	2:30-4:00 p.m.
	Moriches Choral Society Rehearsal	HS Band Room	7:30-10:00 p.m.
TUESDAY November 14, 1989	SC Girl Scouts Daisy Troop 633	Room 23	3:15-4:15 p.m.
	SEPTA General Mtg.	All purpose Room	8:00-10:00 p.m.
	BSA Troop 414	Elem. Cafe.	7:30-9:00 p.m.
	CM Residence Basketball	Main St. Gym	7:00-10:00 p.m.
WEDNESDAY November 15, 1989	CM Girl's Basketball	Main St. Gym	5:30-6:30 p.m.
	Grumman Basketball	Main St. Gym	7:30-9:30 p.m.
	SC Girl Scout Troop #1338	Room 23	2:30-4:00 p.m.
	Board of Education Reg. Mtg.	Board Room	Exec. 6:00 p.m. Pub. 7:30 p.m.
THURSDAY November 16, 1989	CM Co-op Nursery School Gen. Mtg.	Elem. Cafe.	7:00-9:30 p.m.
	Manorville Humane Society Chinese Auc.	HS Cafe.	5:30-11:00 p.m.
	IAABO Bd. 40	HS Gym	7:00-9:30 p.m.
	Cub Pack 23	All purpose room	6:30-9:30 p.m.
	Jr. Girl Scout Troop 176	Main St. Gym	6:30-8:00 p.m.
FRIDAY November 17, 1989			
SATURDAY November 18, 1989	CM Youth Soccer (East End PAL)	HS Fields	10:00 a.m.-4:00 p.m.
	MYO Basketball	Main St. Gym	10:00 a.m.-4:00 p.m.
SUNDAY November 19, 1989	Mastic Soccer Club	HS Fields	4:00-7:00 p.m.
	CM Youth Soccer (East End PAL)	HS Fields	10:00 a.m.-4:00 p.m.
	MYO Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF NOVEMBER 20-26, 1989

MONDAY November 20, 1989	Adult Volleyball SC Girl Scouts Brownie Meeting Moriches Choral Society Rehearsal Prom Nite Committee	Main St. Gym Room 23 HS Band Room HS Library	7:00-9:00 p.m. 2:30-4:00 p.m. 7:30-10:00 p.m. 7:30-10:00 p.m.
TUESDAY November 21, 1989	SC Girl Scouts Daisy Troop #633 BSA Troop 414 CM Residence Basketball	Room 23 All purpose room Main St. Gym	3:15-4:15 p.m. 7:30-9:00 p.m. 7:00-10:00 p.m.
WEDNESDAY November 22, 1989	CM Girl's Basketball Grumman Basketball SC Girl Scouts Troop #1338	Main St. Gym Main St. Gym Room 23	5:30-6:30 p.m. 7:30-9:30 p.m. 2:30-4:00 p.m.
THURSDAY November 23, 1989	School Closed		
FRIDAY November 24, 1989	School Closed		
SATURDAY November 25, 1989	CM Youth Soccer Club (East End PAL) MYO Basketball	HS Fields Main St. Gym	10:00 a.m.-4:00 p.m. 10:00 a.m.-4:00 p.m.
SUNDAY November 26, 1989	Mastic Soccer Club MYO Adult Basketball CM Youth Soccer Club (East End PAL)	HS Fields Main St. Gym HS Fields	4:00-7:00 p.m. 10:00 a.m.-2:00 p.m. 10:00 a.m.-4:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF NOVEMBER 27-DECEMBER 3, 1989

MONDAY November 27, 1989	Adult Volleyball SC Girl Scouts Brownie Mtg. Moriches Choral Society Rehearsal	Main St. Gym Room 23 Band Room	7:00-9:00 p.m. 2:30-4:00 p.m. 7:30-10:00 p.m.
TUESDAY November 28, 1989	SC Girl Scouts Daisy Troop #633 BSA Troop 414 CM Residence Basketball	Room 23 All purpose room Main St. Gym	3:15-4:15 p.m. 7:30-9:00 p.m. 7:00-10:00 p.m.
WEDNESDAY November 29, 1989	CM Girl's Basketball Grumman Basketball SC Girl Scouts Troop #1338	Main St. Gym Main St. Gym Room 23	5:30-6:30 p.m. 7:30-9:30 p.m. 2:30-4:00 p.m.
THURSDAY November 30, 1989	Men's Adult Basketball Cub Pack 23	Main St. Gym All purpose room	7:00-9:30 p.m. 7:00-9:00 p.m.
FRIDAY December 1, 1989	Moriches Pa-Qua-Tuck Chinese Auction	HS Cafe.	5:00-11:00 p.m.
SATURDAY December 2, 1989	MYO Basketball	Main St. Gym	10:00 a.m.-4:00 p.m.
SUNDAY December 3, 1989	Mastic Soccer Club MYO Adult Basketball	HS Fields Main St. Gym	4:00-7:00 p.m. 10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF DECEMBER 4-10, 1989

MONDAY December 4, 1989	Adult Volleyball SC Girl Scouts Adult Meeting Girl Scout Brownie Meeting Moriches Choral Society Rehearsal	Main St. Gym Cafeteria Room 23 HS Band Room	7:00-9:00 p.m. 7:30-9:00 p.m. 2:30-4:00 p.m. 7:30-10:00 p.m.
TUESDAY December 5, 1989	SC Girl Scouts Daisy Troop 633 BSA Troop 414 CM Residence Basketball	Room 23 All Purpose Room Main St. Gym	3:15-4:15 p.m. 7:30-9:00 p.m. 7:00-10:00 p.m.
WEDNESDAY December 6, 1989	Grumman Basketball SC Girl Scout Troop 1338	Main St. Gym Room 23	7:30-9:30 p.m. 2:30-4:00 p.m.
THURSDAY December 7, 1989	Jr. Girl Scout Troop 176 Men's Adult Basketball PTA Exec. Meeting Cub Pack 23 Webelo Mtg.	Elem. Cafe. Main St. Gym Board Room All Purpose Room	7:00-8:30 p.m. 7:00-9:30 p.m. 7:30-10:00 p.m. 7:00-9:00 p.m.
FRIDAY December 8, 1989			
SATURDAY December 9, 1989	MYO Basketball	Main St. Gym	10:00 a.m.-4:00 p.m.
SUNDAY December 10, 1989	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF DECEMBER 11-17, 1989

MONDAY December 11, 1989	Adult Volleyball Girl Scout Brownie Meeting Moriches Choral Society Rehearsal	Main St. Gym Room 23 HS Band Room	7:00-9:00 p.m. 2:30-4:00 p.m. 7:30-10:00 p.m.
TUESDAY December 12, 1989	SEPTA Board Meeting Girl Scout Daisy Troop 633 BSA Troop 414 CM Residence Basketball	Elem. Teachers Rm. Room 23 All Purpose Room Main St. Gym	8:00-10:00 p.m. 3:15-4:15 p.m. 7:30-9:00 p.m. 7:00-10:00 p.m.
WEDNESDAY December 13, 1989	Girl Scout Brownie Troop #1338	Room 23	2:30-4:00 p.m.
THURSDAY December 14, 1989	Jr. Girl Scout Troop 176 Men's Adult Basketball PTA General Meeting Cub Pack 23 Webelo Mtg.	Elem. Cafe. Main St. Gym Elem. Library All Purpose Room	7:00-8:30 p.m. 7:00-9:30 p.m. 7:30-10:00 p.m. 7:00-9:00 p.m.
FRIDAY December 15, 1989			
SATURDAY December 16, 1989	MYO Basketball MYO Basketball	HS Gym Main St. Gym	1:30-4:00 p.m. 10:00 a.m.-4:00 p.m.
SUNDAY December 17, 1989	MYO Adult Basketball	Main St. Gym	10:00 a.m.- 2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF DECEMBER 18-24, 1989

MONDAY December 18, 1989	HS Holiday Music Concert Adult Volleyball SC Girl Scout Brownie Meeting	HS Auditorium Main St. Gym Room 23	7:00-10:00 p.m. 7:00-9:00 p.m. 2:30-4:00 p.m.
TUESDAY December 19, 1989	Elementary Chorus Rehearsal SC Girl Scout Daisy Troop #633 BSA Troop 414 CM Men's Basketball	HS Auditorium Room 23 All purpose room Main St. Gym	6:30-8:30 p.m. 3:15-4:15 p.m. 7:30-9:00 p.m. 7:00-10:00 p.m.
WEDNESDAY December 20, 1989	Elementary Holiday Concert SC Girl Scout Brownie Troop #1338 Board of Education Reg. Mtg.	HS Auditorium Room 23 Board Room	7:30-9:30 p.m. 2:30-4:00 p.m. Exec. 6:00 p.m. Pub. 7:30 p.m.
THURSDAY December 21, 1989	Sr. Citizen Dinner/Band Concert Jr. Girl Scout Troop 176 Men's Basketball	HS Home Ec/Aud/Cafe. Elem. Cafe. Main St. Gym	6:00-10:00 p.m. 7:00-8:30 p.m. 7:00-9:30 p.m.
FRIDAY December 22, 1989			
SATURDAY December 23, 1989	MYO Basketball	Main St. Gym	10:00-4:00 p.m.
SUNDAY December 24, 1989	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF JANUARY 1-7, 1990

MONDAY January 1, 1990	School Closed		
TUESDAY January 2, 1990	School Closed		
WEDNESDAY January 3, 1990	SC Girl Scout Brownie Troop #1338	Room 23	2:30-4:00 p.m.
THURSDAY January 4, 1990	Jr. Girl Scout Troop #176 Men's Adult Basketball PTA Exec. Board Mtg. Cub Pack 23	Elem. Cafe. Main St. Gym Board Room All purpose room	7:00-8:30 p.m. 7:00-9:30 p.m. 7:30-10:00 p.m. 7:00-9:00 p.m.
FRIDAY January 5, 1990			
SATURDAY January 6, 1990	MYO Basketball for Handicapped B MYO Basketball	HS Gym Main St. Gym	1:30-4:00 p.m. 10:00 a.m.-4:00 p.m.
SUNDAY January 7, 1990	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF JANUARY 8-14, 1990

MONDAY January 8, 1990	Paul Gibson Baseball	All purpose room	5:00-6:00 p.m.
	Adult Volleyball	Main St. Gym	7:00-9:00 p.m.
	SC Girl Scout Adult Mtg.	Elem. Cafe.	7:30-9:00 p.m.
	SC Brownie Mtg.	Room 23	2:30-4:00 p.m.
	CM Athletic Booster Club Mtg.	HS Cafe.	7:30-9:30 p.m.
	Prom Nite Mtg.	HS Library	7:30-10:30 p.m.
TUESDAY January 9, 1990	CM Co-op Nursery School Mtg.	Elem. Cafe.	7:00-9:30 p.m.
	SC Girl Scout Daisy Troop 633	Room 23	3:15-4:15 p.m.
	BSA Troop 414	All purpose room	7:30-9:00 p.m.
	CM Resident Basketball	Main St. Gym	7:00-10:00 p.m.
	SEPTA Board Mtg.	Elem. Teachers room	8:00-10:00 p.m.
WEDNESDAY January 10, 1990	SC Girl Scout Brownie Troop 1338	Room 23	2:30-4:00 p.m.
	Board of Ed. Reg. Mtg.	Board Room	Exec. 6:00 p.m. Public 7:30 p.m.
THURSDAY January 11, 1990	Jr. Girl Scout Troop 176	Elem. Cafe.	7:00-8:30 p.m.
	Men's Adult Basketball	Main St. Gym	7:00-9:30 p.m.
	Cub Pack 23	All purpose room	7:00-9:00 p.m.
FRIDAY January 12, 1990	Jr. HS Winter Cotillion	HS Cafe.	8:60-10:00 p.m.
SATURDAY January 13, 1990	MYO Basketball	Main St. Gym	10:00 a.m.-4:00 p.m.
SUNDAY January 14, 1990	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF JANUARY 15-21, 1990

MONDAY January 15, 1990	School Closed		
TUESDAY January 16, 1990	Paul Gibson Baseball	All purpose room	5:00-6:00 p.m.
	SC Girl Scout Daisy Troop 633	Room 23	3:15-4:15 p.m.
	BSA Troop 414	All purpose room	7:30-9:00 p.m.
	CM Residence Basketball	Main St. Gym	7:00-10:00 p.m.
WEDNESDAY January 17, 1990	Paul Gibson Baseball	All purpose room	5:00-6:00 p.m.
	SEPTA	All purpose room	7:30-10:00 p.m.
	SC Girl Scout Brownie Troop 1338	Room 23	2:30-4:00 p.m.
THURSDAY January 18, 1990	Paul Gibson Baseball	All purpose room	5:00-6:00 p.m.
	SC Jr. Girl Scout Troop 176	Elem. Cafe.	7:00-8:30 p.m.
	Men's Adult Basketball	Main St. Gym	7:00-9:30 p.m.
	BSA Cub Pack 23	All purpose room	7:00-9:00 p.m.
FRIDAY January 19, 1990	Paul Gibson Baseball	All purpose room	5:00-6:00 p.m.
SATURDAY January 20, 1990	MYO Basketball for Handicapped boys	HS Gym	1:30-4:00 p.m.
	MYO Basketball	Main St. Gym	10:00 a.m.-4:00 p.m.
SUNDAY January 21, 1990	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF JANUARY 22-28, 1990

MONDAY January 22, 1990	Paul Gibson Baseball Adult Volleyball SC Girl Scout Brownie Mtg.	All purpose room Main St. Gym Room 23	5:00-6:00 p.m. 7:00-9:00 p.m. 2:30-4:00 p.m.
TUESDAY January 23, 1990	SC Girl Scout Daisy Troop 633 BSA Troop 414 CM Residence Basketball Paul Gibson Baseball	Room 23 All purpose room Main St. Gym All purpose room	3:15-4:15 p.m. 7:30-9:00 p.m. 7:00-10:00 p.m. 5:00-6:00 p.m.
WEDNESDAY January 24, 1990	SC Girl Scout Brownie Troop 1338 Paul Gibson Baseball	Room 23 All purpose room	2:30-4:00 p.m. 5:00-6:00 p.m.
THURSDAY January 25, 1990	SC Jr. Girl Scout Troop 176 Men's Adult Basketball BSA Cub Pack 23 Paul Gibson Baseball	Elem. Cafe. Main St. Gym All purpose room All purpose room	7:00-8:30 p.m. 7:00-9:30 p.m. 6:30-9:30 p.m. 5:00-6:00 p.m.
FRIDAY January 26, 1990	CM PTA Prime Time 5th & 6th grade Paul Gibson Basketball	Cafe./All purp. rm. All purpose room	6:00-10:00 p.m. 5:00-6:00 p.m.
SATURDAY January 27, 1990	MYO Basketball	Main St. Gym	10:00 a.m.-4:00 p.m.
SUNDAY January 28, 1990	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF JANUARY 29-FEBRUARY 4, 1990

MONDAY January 29, 1990	HS Musical Rehearsal Adult Volleyball Girl Scout Brownie Mtg. Paul Gibson Baseball	HS Auditorium Main St. Gym Room 23 All purpose room	7:00-10:00 p.m. 7:00-9:00 p.m. 2:30-4:00 p.m. 5:00-7:00 p.m.
TUESDAY January 30, 1990	Girl Scout Daisy Troop Mtg. BSA Troop 414 CM Res. Basketball	Room 23 All purpose room Main St. Gym	3:15-4:15 p.m. 7:30-9:00 p.m. 7:00-10:00 p.m.
WEDNESDAY January 31, 1990	Girl Scout Brownie Troop 1338 Paul Gibson Baseball	Room 23 All purpose room	2:30-4:00 p.m. 5:00-7:00 p.m.
THURSDAY February 1, 1990	Jr. Girl Scout Troop 176 Men's Adult Basketball PTA Exec. Bd. Mtg. Cub Pack 23	Elem. Cafe. Main St. Gym Board Room All purpose room	7:00-8:30 p.m. 7:00-9:30 p.m. 7:30-10:00 p.m. 7:00-9:00 p.m.
FRIDAY February 2, 1990	Holiday Beach Prop. Owners Mtg. Paul Gibson Baseball	Main St. Gym All purpose room	7:00-11:00 p.m. 5:00-7:00 p.m.
SATURDAY February 3, 1990	MYO Basketball for Handicapped Boys MYO Basketball	HS Gym Main St. Gym	1:30-4:00 p.m. 10:00 a.m.-4:00 p.m.
SUNDAY February 4, 1990	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF FEBRUARY 5-11, 1990

MONDAY February 5, 1990	HS Musical Rehearsal Paul Gibson Baseball SC Girl Scout Adult Mtg. Adult Volleyball Girl Scout Brownie Mtg. CM Prom Committee Mtg.	HS Auditorium All Purpose Room Elem. Cafe. Main St. Gym Room 23 HS Lib.	7:00-10:00 p.m. 5:00-7:00 p.m. 7:30-9:00 p.m. 7:00-9:00 p.m. 2:30-4:00 p.m. 8:00-10:00 p.m.
TUESDAY February 6, 1990	SC Girl Scout Daisy Troop 633 BSA Troop 414 CM Res. Basketball PTA General Mtg. HS Musical Rehearsal	Room 23 All Purpose Room Main St. Gym Elem. Library HS Auditorium	3:15-4:15 p.m. 7:30-9:00 p.m. 7:00-10:00 p.m. 6:30-10:00 p.m. 7:00-10:00 p.m.
WEDNESDAY February 7, 1990	Board of Ed. Workshop Girl Scout Brownie Troop 1338 Paul Gibson Baseball HS Musical Rehearsal	Board Room Room 23 All Purpose Room HS Auditorium	7:30 p.m. 2:30-4:00 p.m. 5:00-7:00 p.m. 7:00-10:00 p.m.
THURSDAY February 8, 1990	CM Dist. Staff Dev. Jr. Girl Scout Troop 176 Men's Adult Basketball Cub Pack 23 HS Musical Rehearsal CM Jr. /Sr. Prom Committee Mtg.	Elem. Lib. Elem. Cafe. Main St. Gym All Purpose Room HS Auditorium HS Lib.	4:00-7:30 p.m. 7:00-8:30 p.m. 7:00-9:30 p.m. 7:00-9:00 p.m. 7:00-10:00 p.m. 7:30-9:30 p.m.
FRIDAY February 9, 1990	Paul Gibson Baseball HS Musical	All Purpose Room HS Auditorium	5:00-7:00 p.m. 7:30 p.m.
SATURDAY February 10, 1990	MYO Basketball HS Musical	Main St. Gym HS Auditorium	10:00 a.m.-4:00 p.m. 7:30 p.m.
SUNDAY February 11, 1990	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF FEBRUARY 12-18, 1990

MONDAY February 12, 1990	Paul Gibson Baseball Clinic Adult Volleyball Girl Scout Brownie Mtg.	All purpose room Main St. Gym Room 11	5:00-7:00 p.m. 7:00-9:00 p.m. 2:30-4:00 p.m.
TUESDAY February 13, 1990	Girl Scout Daisy Troop 633 BSA Troop 414 CM Res. Basketball SEPTA Board Mtg.	Room 23 All purpose room Main St. Gym Elem. Teachers rm.	3:15-4:15 p.m. 7:30-9:00 p.m. 7:00-10:00 p.m. 7:30-10:00 p.m.
WEDNESDAY February 14, 1990	Girl Scout Brownie Troop 1338 & 1721 Elem. Student Council Dance 5 & 6 gr. Girl Scout Brownie Mtg.	Elem. Cafe. All purpose rm. Room 23	6:30-8:00 p.m. 5:30-7:00 p.m. 2:30-4:00 p.m.
THURSDAY February 15, 1990	CM Dist. Staff Dev. Jr. Girl Scout Troop 176 Men's Adult Basketball Cub Pack 23	Elem. Library Elem. Cafe. Main St. Gym All purpose room	4:00-7:30 p.m. 7:00-8:30 p.m. 7:00-9:30 p.m. 7:00-9:00 p.m.
FRIDAY February 16, 1990	CM Music Award Chinese Auction	HS Cafe.	6:00-10:00 p.m.
SATURDAY February 17, 1990	MYO Basketball for Handicapped Boys MYO Basketball	HS Gym Main St. Gym	1:30-4:00 p.m. 10:00 a.m.-4:00 p.m.
SUNDAY February 18, 1990	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF FEBRUARY 26-MARCH 4, 1990

MONDAY February 26, 1990	Adult Volleyball Girl Scout Brownie Mtg.	Main St. Gym Room 11	7:00-9:00 p.m. 2:15-4:00 p.m.
TUESDAY February 27, 1990	Girl Scout Daisie Troop 633 BSA Troop 414 CM Res. Basketball	Room 23 All purpose room Main St. Gym	3:15-4:15 p.m. 7:30-9:00 p.m. 7:00-10:00 p.m.
WEDNESDAY February 28, 1990	Girl Scout Brownie Troop 1338	Room 12	2:30-4:00 p.m.
THURSDAY March 1, 1990	CM Dist. Staff Dev. Jr. Girl Scout Troop 176 Men's Adult Basketball Cub Pack 23 PTA Exec. Bd. Mtg. Jump for the Heart grades 1 thru 4	Elem. Library Elem. Cafe. Main St. Gym All purpose room Board Room Main St. Gym	4:00-7:30 p.m. 7:00-8:30 p.m. 7:00-9:30 p.m. 7:00-9:00 p.m. 7:30-10:00 p.m. 2:45-4:45 p.m.
FRIDAY March 2, 1990	Skate for the Heart grades 5 & 6 CM PTA Prime Time 4th grade HMEA HS Music Festival	Main St. Gym Cafe./All purp. rm. Aud/Cafe./Rm 5	2:45-4:45 p.m. 6:00-10:00 p.m. 3:00-10:00 p.m.
SATURDAY March 3, 1990	HMEA HS Music Festival MYO Basketball	Aud/Cafe/Rm 5 Main St. Gym	9:00 a.m.-10:00 a.m. 10:00 a.m.-4:00 p.m.
SUNDAY March 4, 1990	MYO Adult Basketball	Main St. Gym	10:00 a.m.-2:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF MARCH 5-11, 1990

MONDAY March 5, 1990	Adult Volleyball SC Girl Scout Adult Mtg. SC Girl Scout Brownie Mtg.	Main St. Gym Elem. Cafe. Room 11	7:00-9:00 p.m. 7:30-9:00 p.m. 2:30-4:00 p.m.
TUESDAY March 6, 1990	Jr./Sr. Prom Com. Volleyball game SC Girl Scout Daisy Troop 633 BSA Troop 414 CM Res. Basketball	HS Gym Room 23 All purp. rm. Main St. Gym	4:00-6:30 p.m. 3:15-4:15 p.m. 7:30-9:00 p.m. 7:00-10:00 p.m.
WEDNESDAY March 7, 1990	CM SEPTA Karate Program SC Girl Scout Brownie Troop 1338	Main St. Gym Room 23	7:00-9:00 p.m. 2:30-4:00 p.m.
THURSDAY March 8, 1990	PTA Board Mtg. CM Dist. Staff Dev. Jr. Girl Scout Troop 176 Men's Adult Basketball Cub Pack 23 Intern Seminar	Board Room Elem. Lib. Room 23 Main St. Gym Elem. Cafe. Board Room	7:30 p.m. 4:00-7:30 p.m. 6:30-8:00 p.m. 7:00-9:30 p.m. 7:00-9:00 p.m. 4:00 p.m.
FRIDAY March 9, 1990	Jr. Class Dance	HS Cafe.	7:30-10:30 p.m.
SATURDAY March 10, 1990	CM SEPTA Magic Show MYO Basketball for Handicapped Boys MYO Basketball	HS Aud. HS Gym Main St. Gym	1:30-4:30 p.m. 1:30-4:00 p.m. 10:00 a.m.-4:00 p.m.
SUNDAY March 11, 1990	Mastic Soccer Club MPO Adult Basketball	HS Soccer Fields Main St. Gym	4:00-7:00 p.m. 10:00 a.m.-2:00 p.m.

PLAINTIFFS EXHIBIT 5a

LAMB'S CHAPEL
P.O. Box 663
Center Moriches, New York 11934

John D. Steigerwald
Pastor

November 21, 1988

Mrs Alice Schoener
Center Moriches School District
511 Main Street
Center Moriches, NY 11934

Dear Mrs. Schoener:

Greetings! Allow me to introduce myself to you. My name is Rev. John D. Steigerwald. I pastor a growing congregation that is presently conducting its Sunday morning services and Sunday school in the V.F.W. Hall located on Main Street in Center Moriches.

My wife, Deralyn, and daughter Bethany, moved into the community this past July and are still getting acquainted with the people and leaders of the community.

The church consists of respectable families from Center Moriches and the surrounding towns. They come from all various walks of life and professions.

Our paramount objective is to share the love of Christ in very real and practical ways. We have a strong local and foreign missions program. I have just returned from Jamaica, where we assisted a school and brought relief aid. I also took a team of individuals to Guatemala, Central America, we assisted a drug and alcohol rehabilitation center. On the local level, we have a quite a extensive food and clothing ministry that distributes to needy families. Presently, we are cooking several turkeys as part of a group effort that will feed over 500 men and women in Tompkins Square Park in New York City this Thanksgiving. We are also distributing several turkeys and dressing for needy families.

There are other positive people-oriented programs that the church is involved with that I will hopefully share with you in the future. But, as you can see the church is very community-oriented and people-concerned.

The church has experienced such growth that it creates a problem for me and the families of our congregation. The V.F.W. Hall which is headed by Bernard A. Volin (who has been more than courteousl and accommodating) is no longer adequate for our Sunday services.

On Thursday November 17, 1988 I was given a tour of the Center Moriches High School by Mr. Bob Jaeger, who was a very kind and courteous man. My purpose was to see if the school had adequate facilities for a movie series on the family that will be free of charge and open for the community to attend.

I also met briefly with Mr. Bud Mazura the principal of the school, who was immediately concerned with the content of the film and that it be non-sectian because of the "separation of church and state" clause in the constitution. This seems to be a phrase that I have continually encountered in the community. Those who enspouse such a reply and view are seriously misinformed. Enclosed you will find several articles that correctly interpret the law that is presently being upheld by the Supreme Court of the United States of America. The highest court in our land.

I have also included a letter of recommendation that the President of the Center Moriches V.F.W. Hall wrote for a friend of mine.

Mrs Schoener, I hope that the enclosed information will calm the fears of allowing a religious group access to a public governmental building and will correctly inform those who have the authority to approve our request for the use of the High School. Our present lease at the V.F.W. Hall expires December 31, 1988. I would like a response as soon as possible. Thank you.

If there are any further proceedures that I must comply with please do not hesitate to contact me. I look forward to developing a strong and healthy community working relationship with the Center Morchies district.

Sincerely,

/s/ Rev. John Steigerwald
REVEREND JOHN STEIGERWALD

CENTER MORICHES UNION FREE SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 11/19/88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Lamb's Chapel

TYPE OF ACTIVITY
Sunday a.m. services

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room	1	Auditorium	1
Classroom	2	Fields	
Gymnasium	2	Other	Some classes close to Auditorium

* * * *

PURPOSE (Give specific purpose)
to conduct Sunday a.m. service and Sunday School, Nursery, etc.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
No

* * * *

FOR OFFICE USE ONLY

Approved *
Disapproved ✔
Modified

Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

[Flip side of application]

RULES AND REGULATIONS FOR COMMUNITY USE OF SCHOOL FACILITIES

Groups requesting use of school facilities must be predominantly composed of residents and/or students from the Center Moriches school community. Outside not-for-profit organizations may request the use of a facility but approval will be granted only if it can be clearly demonstrated that there is a benefit to the Center Moriches school community.

1. An application for use of the school premises is to be secured from the district office. Said application must be completed and returned for subsequent approval or disapproval. On approval, a copy will be returned to the applicant.
2. The applicant will not be admitted to the premises prior to the time stipulated on the application, and every effort should be made to vacate the premises at the time stipulated in the application.
3. There shall be no gambling or use of intoxicating beverages at any time on the school premises.
4. If refreshments are to be served, all details must be stated in the application and the administration reserves the right to designate the area.
5. Applicants are responsible for any damage to school property.
6. Applicants are responsible for injury or liability incurred. The Board of Education may require the applicant to furnish a certificate of insurance in accordance with the following:
   a. The insurance carrier must be licensed by the NYS Insurance Dept. to conduct business in New York.
   b. The interests of the CMUFSD are to be included as an additional insured; and such inclusion is to be evidenced by signed, original endorsement.
   c. Certificates are required on company imprinted stationery, "Acord" or other blank certificates are not acceptable. In the absence of company imprinted stationery, a letter of transmittal from the insurance company, signed by an authorized representative, will be acceptable.
   d. Limits of liability: Comprehensive general liability including products liability if applicable. $500,000 to $1,000,000 bodily injury and $50,000 property damage.
7. The school premises shall not be used by any group for religious purposes.
8. The use of the premises by political organizations must be secured in compliance with Section 414 of the Education Law of the State of New York.
9. A permit will not be issued for personal or private gain, financial or otherwise.
10. A permit for a social, civic, or recreational use shall be approved only if it can be non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event.
11. For an event where admission fees are charged, the proceeds must, by State law, be expended for an educational or charitable purpose.
12. Applicants are responsible for providing adequate supervision for all events in order to insure the proper conduct and discipline of such activity. A list of chaperones may be required to be submitted with the application.
13. For any activity involving school age children, a minimum of two adult supervisors must be pres-

ent. Additional supervisors are to be provided for activities with large participation.

14. Only those facilities and items requested and approved may be used by the applicant.

15. The School District reserves the right to impose a charge for the use of the premises, according to the services rendered. Where special custodial or cleaning is required, fees will be imposed. A minimum fee will be collectible in advance. Additional charges will be billed as required.

16. The School District reserves the right to require its custodians to be on duty during the use of the facility by the applicant.

17. Smoking will be permitted only in the designated smoking areas.

18. No permit is valid unless signed by the authorized administrator.

19. The approved permit must be exhibited upon request to any representative, staff member or official of the School District.

20. The applicant's equipment and materials must be removed from the building promptly after its use so as not to interfere with school activities.

21. The permit is valid only for the times and purpose specified in the application. A new application must be filed at the beginning of each school year.

22. A permit is not transferable.

23. The school administration and the Board of Education may cancel any activity when the school facility is required for a school-sponsored event.

24. In order to insure the equitable use of school facilities for community use, all approved applications are subject to rescheduling and or cancellation by the school administration.

25. It is the responsibility of the applicant to see that the facilities used are left in a clean and orderly condition and all waste materials deposited in the proper receptacle.

26. It will be the responsibility of the groups who have secured a permit for a scheduled use of the school facilities to inform the School District if the scheduled use will be changed or cancelled.

27. A permit that has been issued may be cancelled and future applications denied if the applicant fails to comply with the foregoing rules and regulations.

28. The School District has the right to prohibit any proposed activity which might be deemed detrimental to the best interests of the School District.

These regulations have been established in conformance with the intent as stated in Section 414 of the Education Law of the State of New York. In addition to this, all Federal and State Laws, Local Ordinances, and rules of the Police and Fire Departments regarding public assemblies must be strictly obeyed.

PLAINTIFFS EXHIBIT 5b

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
511 Main Street
Center Moriches, New York 11934-2210
(516) 878-0052

November 23, 1988

The Rev. John Steigerwald
Pastor, Lamb's Chapel
PO Box 663
Center Moriches, NY 11934

Dear Mr. Steigerwald:

I am in receipt of your November 21 letter requesting the use of the high school for your Sunday services. Unfortunately, in accordance with No. 7 of our currently existing rules and regulations, your request must be denied (see New York State Education Law Section 414, which governs the board's position). I am very much afraid that, even without the prohibited religious activity aspect, your request would have to be denied. All organizations who use our facilities must cancel their plans any time school is not in session. In those few "one-time events" where organizations use our auditorium on a weekend, the school district requires security guards and custodians to be on duty with substantial charges being levied against the organization.

I regret that we cannot consider your request, and sincerely hope that you are able to find adequate facilities for your worthwhile organization.

Sincerely yours,

/s/ Alice M. Schoener
ALICE M. SCHOENER
Business Manager

AMS:cam

PLAINTIFFS EXHIBIT 6a

LAMB'S CHAPEL
P.O. Box 663
Center Moriches, New York 11934

John D. Steigerwald
Pastor

December 16, 1988

Mrs. Alice M. Schoener
Business Manager
Center Moriches School District
511 Main Street
Center Moriches, NY 11934-2210

Dear Mrs Schoener:

Enclosed you will find two applications reqesting the use of the Highschool for different functions. Would you please get back to me as soon as possible for proper planning.

I appreciate your prompt reply.

Sincerely,

/s/ John Steigerwald
JOHN STEIGERWALD
Reverend

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 12/16/88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Lamb's Chapel

TYPE OF ACTIVITY
Family emphasis & movie presentation by Dr. James Dobson

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	____	Library	____
All Purpose Room	____	Auditorium	1
Classroom	____	Fields	____
Gymnasium	2	Other	____

* * * *

PURPOSE (Give specific purpose)
to open the files to share some pracital insights about the family

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
No

* * * *

FOR OFFICE USE ONLY

Approved * ____
Disapproved ____
Modified ____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

PLAINTIFFS EXHIBIT 6b

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
511 Main Street
Center Moriches, New York 11934-2210
(516) 878-0052

January 18, 1989

Reverend John Steigerwald
PO Box 663
Center Moriches, NY 11934

Dear Mr. Steigerwald:

I have your requests of December 16, for what appear to be five mid-week evenings from 7-10 pm for the high school auditorium, and once-a-month use of the gymnasium. I think you can understand my reluctance to unilaterally grant these requests. As indicated in my earlier letter to you, we are bound by education law concerning the use of school facilities by religious organizations. Fortunately, we have not, to date, been put to the test of determining when a use of the facility by one of our local churches would constitute "religious purposes." I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations.

The district has not, in the past, allowed the high school auditorium to be used by any group primarily for its own purposes. I am afraid neither facility would be available on Friday nights because of the number of varsity, junior varsity, and junior high basketball games.

If you care to pursue your request, please provide a more detailed description of your proposed use (including a brochure describing the film), along with an indication from your insurance company that you will have no prob-

lem meeting the requirements listed at item #6 in our rules and regulations. I will be happy to present your request to the Board of Education at our February meeting.

Sincerely,
BOARD OF EDUCATION

/s/ Alice M. Schoener
ALICE M. SCHOENER
District Clerk

AMS:cam

PLAINTIFFS EXHIBIT 6c

LAMB'S CHAPEL
P.O. Box 663
Center Moriches, New York 11934

John D. Steigerwald
Pastor

February 2, 1989

Mrs Alice M. Schoener
District Clerk
C.M.U.F.S.D.
511 Main Street
Center Moriches, NY 11934

Dear Mrs. Schoener:

I have received your letter regarding more information about the requests we have made for the use of the high school.

Enclosed you will find a brochure describing the film we desire to show. "Turn Your Heart Toward Home"

I am also making a separate request for use of the any of the Center Moriches School facilities for "non-religious purposes" such as volley ball. The elementary School would be fine if the high school is not available on Fridays and Saturdays evenings.

We are happy to meet with any other regulations for using the facilities. I would like you to present the requests to the board of Education at your February meeting and would appreciate specific answers for both accounts. Thank you for your time and help.

Sincerely,

REVEREND JOHN STEIGERWALD

JDS:js
enc.

PLAINTIFFS EXHIBIT 6d

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
511 Main Street
Center Moriches, New York 11934-2210
(516) 878-0052

February 8, 1989

Reverend John Steigerwald
Lamb's Chapel
PO Box 663
Center Moriches, NY 11934

Dear Mr. Steigerwald:

I received your February 2 letter with the brochure describing the film you propose to show. This film does appear to be church related and therefore your request must be refused. In addition, your request for volleyball for Friday or Saturday at either the elementary or high school must also be refused. We do not schedule outside organizations to use the facilities on Fridays and Saturdays.

Sincerely,

BOARD OF EDUCATION

/s/ Alice M. Schoener
ALICE M. SCHOENER
District Clerk

AMS:cam

[brochure]

Over 50 million parents were inspired by *Focus on the Family*. Now, [photo] **Dr. James and Shirley Dobson have taken the** [photo] **next dramatic step.**

INTRODUCING A POWERFUL SIX-PART FILM SERIES THAT WILL MOVE YOU TO ACTION.

Turn Your Heart Toward Home

"There's a time when the door to childhood gently closes, and no power on earth can open it again."

Over 50 million concerned parents and family groups have benefited from Dr. James Dobson's enlightening film series, *Focus on the Family.*

Now, building on that nationwide groundswell of interest, Word Publishing and Focus on the Family, Inc. present *Turn Your Heart Toward Home*—a personally challenging six-part film series every parent should see. Soon. Before the doors begin to close.

"We must form precious memories with our children before they grow up. . ."

In this bold new film series, America's most trusted family life expert brings his vast experience to bear on one of society's most pressing challenges—the protecting and strengthening of family relationships.

Citing example after familiar example, Dr. Dobson portrays the pressures today's parents are susceptible to. The time traps that steal precious moments so important to a child's welfare. The battlegrounds of parent child relationships.

And he reminds parents of society's slide toward humanism—the undermining influences of radio, television, films and the press—which can only be counterbalanced by a loving home where Christian values are instilled from an early age.

"Time is the priceless gift we can give our families."

A swelling majority of Americans sense the vulnerability of their own families, and are willing to make all commitments necessary to preserve them. Commitments to

their marital relationships. Commitments to their children and home lives. Commitments to get involved in issues that affect the family.

It is the purpose of this powerful new film series to challenge those individuals to return to the traditional values upon which families are best created and nurtured.

Turn Your Heart Toward Home is available now in a series of six discussion-provoking films:

1) A FATHER LOOKS BACK emphasizes how swiftly time passes and appeals to all parents to "turn their hearts toward home" during the all-important child-rearing years. *(60 minutes.)*

2) POWER IN PARENTING: THE YOUNG CHILD begins by exploring the inherent nature of power, and offers many practical helps for facing the battlegrounds in child-rearing—bedtime, mealtime and other confrontations so familiar to parents. Dr. Dobson also takes a look at areas of conflict in marriage and other adult relationships. *(60 minutes.)*

3) POWER IN PARENTING: THE ADOLESCENT discusses father/daughter and mother/son relationships, and the importance of allowing children to grow to develop as individuals. Dr. Dobson also encourages parents to free themselves of undeserved guilt when their teenagers choose to rebel. *(45 minutes.)*

4) THE FAMILY UNDER FIRE views the family in the context of today's society, where a "civil war of values" is being waged. Dr. Dobson urges parents to look at the effects of governmental interference, abortion and pornography, and to get involved. To preserve what they care about most—their own families! *(52 minutes.)*

Note: This film contains explicit information regarding the pornography industry. Not recommended for young audiences.

5) OVERCOMING A PAINFUL CHILDHOOD includes Shirley Dobson's intimate memories of a difficult childhood with her alcoholic father. Mrs. Dobson recalls the influences which brought her to a loving God who saw her personal circumstances and heard her cries for help. *(40 minutes.)*

6) THE HERITAGE presents Dr. Dobson's powerful closing remarks. Here he speaks clearly and convincingly of our traditional values which, if properly employed and defended, can assure happy, healthy, strengthened homes and family relationships in the years to come. *(60 minutes.)*

Films 1, 5 and 6 were filmed before a capacity crowd of 16,000 at a historic pro-family rally in Cincinnati's Riverfront Coliseum.

Films 2, 3 and 4 were filmed at a weekend retreat at The Navigators' Glen Eyrie Christian Conference Center near Colorado Springs, Colorado.

[PHOTO]

[PHOTO]

James C. Dobson, Ph.D., is a licensed psychologist, teacher and author of nine best-selling books, with over 4½ million copies in print. He served for fourteen years as Associate Clinical Professor of Pediatrics at the University of Southern California, and on the attending staff of Children's Hospital in Los Angeles. Currently, he is President of Focus on the Family, a non-profit corporation dedicated to the preservation of the home, as well as host of a daily half-hour radio program broadcast on over 800 stations across the country.

In 1980, Dr. Dobson was appointed by President Carter as a member of the Task Force summarizing the work of the White House Conferences on the Family. In 1982, he was appointed by President Reagan to the National Advisory Commission of the Office of Juvenile Justice and Delinquency Prevention, and since has consulted with the President on governmental policies that affect the family. More recently, he has served on the Attorney General's Commission on Pornography.

[PHOTO]

Shirley Dobson is a graduate of Pasadena College where she was included in "Who's Who in American Colleges and Universities." Following graduation, she taught in the Hudson and Arcadia (California) Unified School District for seven years.

After the birth of her first child, Mrs. Dobson chose to become a full-time mother and homemaker. In recent years, she has been active in a variety of Christian endeavors, serving as Director of Women's Ministries for a large evangelical church, and as a leader in Bible Study Fellowship groups. She is also co-author of a best-selling book on family traditions entitled *Let's Make a Memory.*

We would like to thank all those associated with The Navigators' Glen Eyrie for their cooperation in the filming of this series.

[stamped return address:]
Tel. 516/261-1010
CHURCH FILMS INC.
6 Brightside Avenue
East Northport, N.Y. 11731

WORD PUBLISHING
Waco, TX 76796

PLAINTIFFS EXHIBIT 7a

LAMB'S CHAPEL

P.O. Box 663
Center Moriches, New York 11934

John D. Steigerwald
Pastor

October 23, 1989

Center Moriches Union Free School District
Center Moriches, NY 11934

To Whom It May Concern,

Enclosed you will find the applications for a movie series we desire to show for the community of Center Moriches. It is a family oriented series, to encourage and educate parents in raising positive families. James Dobson is the producer of the movie, and is the president of a National Christian Organization called "Focus On The Family".

We desire to show the series this coming new year of 1990. January, February or March are fine. The only request we have, is that whatever day of the week you choose to give us, that we may have that same day of the week for 5 consecutive weeks. If you have any problems with this, or need to clarify something, please feel free to call.

Sincerely,

/s/ John Steigerwald
JOHN STEIGERWALD
Pastor

c: H. TRABOLD

CENTER MORICHES UNION FREE SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 10/11/89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Lamb's Chapel

TYPE OF ACTIVITY
Movie: Turn Your Heart Home. Family oriented movie--from a Christian perspective. James Dobson

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	____	Library	____
All Purpose Room	____	Auditorium	x
Classroom	____	Fields	____
Gymnasium	____	Other	____

* * * *

PURPOSE (Give specific purpose)
To invite community of Center Moriches to view this very pracitial movie for family raising

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
—No—

* * * *

FOR OFFICE USE ONLY

Approved *	____	
Disapproved	✔	/s/ A.M. Schoener
Modified	____	Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

COMMENTS: See #7 on reverse, & my letter of 2/8/89

PLAINTIFFS EXHIBIT 7b

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
511 Main Street
Center Moriches, New York 11934-2210
(516) 878-0052

November 15, 1989

Reverend John Steigerwald
Lamb's Chapel
PO Box 663
Center Moriches, NY 11934

Dear Mr. Steigerwald;

I received your October 23 letter with the building use form requesting use of the high school auditorium. This film does appear to be church related and therefore your request must be refused.

Sincerely,

BOARD OF EDUCATION

/s/ Alice M. Schoener
ALICE M. SCHOENER
District Clerk

AMS:cam

PLAINTIFFS EXHIBIT 9a

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date January 6, 1989

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Hampton Council of Churches/Family Counseling Services

TYPE OF ACTIVITY
Billy Taylor Concert

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	✔
Classroom		Fields	
Gymnasium		Other	Cafeteria

* * * *

PURPOSE (Give specific purpose)
To promote awareness of the family counseling services of the Hampton Council of Churches.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
Offset Expenses—Essentially Non-Profit

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

PLAINTIFFS EXHIBIT 9b

[SEAL]

AN EVENING WITH
BILLY TAYLOR
AND HIS TRIO

Benefit

The Family Counseling Service

April 15, 1989—8:00 P.M.
Chester G. Osborne Memorial Auditorium

Center Moriches High School
311 Frowein Road
Center Moriches, New York

Admission $15.00—All seats reserved

Patrons $50.00

For information call 878-0092

Please cut along the dotted line and return form

Please send —— tickets for An Evening with Billy Taylor at $15.00 each. Patrons $50.00 each.

Total ————

To: Name ————————

Street ————————

City/State/Zip ————

Please make checks payable to the
Family Counseling Service and mail to:

Billy Taylor Concert
Center Moriches High School
311 Frowein Road
Center Moriches, NY 11934

PLAINTIFFS EXHIBIT 11a

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Sept. 8, 1988

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Music Department and Salvation Army

TYPE OF ACTIVITY
Joint Concert and Dinner for band members

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	____	Library	____
All Purpose Room	____	Auditorium	x
Classroom	____	Fields	____
Gymnasium	____	Other	____

* * * *

PURPOSE (Give specific purpose)
Joint concert with the Greater New York Youth Band of the Salvation Army
Fund raiser for the Salvation Army
$500 Scholarship for CM student.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved ____ /s/ [Illegible]
Modified ____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

PLAINTIFFS EXHIBIT 12a

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 2-6-88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Southern Harmonize Gospel Singing

TYPE OF ACTIVITY
Gospel singing

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	_____	Library	_____
All Purpose Room	_____	Auditorium	_✔_
Classroom	_____	Fields	_____
Gymnasium	_____	Other	_____

* * * *

PURPOSE (Give specific purpose)
to donating money to the Black Scholarship program

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
8-10 dollars per person

* * * *

FOR OFFICE USE ONLY

Approved* /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

PLAINTIFFS EXHIBIT 14

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date _____

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Unkechaug Dance Group

TYPE OF ACTIVITY
Cultural Program

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	_x_	Library	_____
All Purpose Room	_____	Auditorium	x
Classroom	_____	Fields	_____
Gymnasium	_____	Other	_____

* * * *

PURPOSE (Give specific purpose)
Raise funds for costumes and materials

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
Dance group

* * * *

FOR OFFICE USE ONLY

Approved * [large check across application]
Disapproved _____
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

PLAINTIFFS EXHIBIT 15

CENTER MORICHES UNION FREE SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Aug. 16, 1988

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Moriches Bay Civic Association, Inc.

TYPE OF ACTIVITY
Civic group meeting

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)			
Cafeteria	__ ½ __	Library	_____
All Purpose Room	_____	Auditorium	_____
Classroom	_____	Fields	_____
Gymnasium	_____	Other	_____

* * * *

PURPOSE (Give specific purpose)
Monthly meeting to discuss and formulate methods to be followed regarding ways of maintaining or improving community standards

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
No fee

* * * *

FOR OFFICE USE ONLY

Approved *	__ ✔ __	
Disapproved	_____	/s/ [Illegible]
Modified	_____	Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

PLAINTIFFS EXHIBIT 16

CENTER MORICHES UNION FREE SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 25 Sept 1986

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Center Moriches Free Public Library

TYPE OF ACTIVITY
Lecture series "Psychology & The Unknown" by Jerry Huck, MSW, CSW, ACSW

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)			
Cafeteria	__ ✔ __	Library	_____
All Purpose Room	_____	Auditorium	_____
Classroom	_____	Fields	_____
Gymnasium	_____	Other	_____

* * * *

PURPOSE (Give specific purpose)
Educational

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
None

* * * *

FOR OFFICE USE ONLY

Approved *	__ ✔ __	
Disapproved	_____	/s/ [Illegible]
Modified	_____	Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

PLAINTIFFS EXHIBIT 20

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF SEPTEMBER 7-13, 1987

MONDAY 7	Adult Volleyball	Main St. Gym	7:00-9:00
	C.M. Youth Soccer	Elem. Fields	6:00-8:00
	CLOSED LABOR DAY		
TUESDAY 8	[Illegible]		
WEDNESDAY 9	[Illegible]		
THURSDAY 10	C.M. Youth Soccer	Elem. Fields	6:00-8:00
	PTA Meeting	Board Room	7.30-9:30
FRIDAY 11	[Illegible]		
SATURDAY 12	P.A.L. Youth Soccer (practice)	H.S. Fields	1:00-4:30
SUNDAY 13	P.A.L. Youth Soccer (Games)	H.S. Fields	1:00-4:30

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CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF SEPTEMBER 14-20, 1987

MONDAY 9/14/87	Adult Volleyball	Main St. Gym	7:00-9:00 p.m.
	C.M. Youth Soccer	Elem. Fields	6:00-8:00 p.m.
	SCGS Reg. Monthly Meeting	Elem. Cafeteria	
TUESDAY 9/15/87	Moriches Bay Power Squadron	Elem. Cafeteria	7:30-10:00 p.m.
	S.A.T. Prep. Course	H.S.	6:00- 8:00 p.m.
	Primary Day	Main St. Gym	5:30 a.m.-9:00 p.m.
WEDNESDAY 9/16/87	Moriches Bay Civic Assn.	Elem. All Purpose Rm.	8:00-10:00 p.m.
THURSDAY 9/17/87	C.M. Youth Soccer	Elem. Fields	6:00-8:00 p.m.
	S.A.T. Prep. Course	H.S.	6:00-8:00 p.m.
	Suffolk Basketball Coaches Assn.	H.S. Auditorium	7:30-9:30 p.m.
	Manorville Humane Society	H.S. All Purpose Rm.	7:00-11:00 p.m.
	Open School Night	Elementary School	7:30 p.m.
FRIDAY 9/18/87	Family Counseling Service	Board Room	9:00-10.30 a.m.
	[Illegible]	[Illegible]	[Illegible]
SATURDAY 9/19/87	P.A.L. Youth Soccer (practice)	H.S. Fields	12:00-5:00 p.m.
SUNDAY 9/20/87	P.A.L. Youth Soccer (Games)	H.S. Fields	12:00-5:00 p.m.

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CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF SEPTEMBER 21-27, 1987

MONDAY 9/21/87	Adult Volleyball C.M. Youth Soccer	Main St. Gym Elem. Fields	7:00-9:00 p.m. 6:00-8:00 p.m.
TUESDAY 9/22/87	Moriches Bay Power Squadron Boy Scouts of America Troop 414 Board of Education	Elem. Cafeteria Elem. All Purpose Room Board Room	7:30-10:00 p.m. 7:30-9:00 p.m. 8:30 p.m.
WEDNESDAY 9/23/87	[Illegible]	[Illegible]	8:00-10:00 p.m.
THURSDAY 9/24/87	SCHOOLS CLOSED		
FRIDAY 9/25/87	SCHOOLS CLOSED		
SATURDAY 9/26/87	P.A.L. Youth Soccer (practice) Summer Reading Program Party	H.S. Fields All Purpose Room	12:00-5:00 p.m. 11:00 a.m.-1:00 p.m.
SUNDAY 9/27/87	P.A.L. Youth Soccer (Games) Women's Soccer	H.S. Fields H.S. Fields	12:00-5:00 p.m. 4:00-6:00 p.m.

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CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF SEPTEMBER 28, 1987-OCTOBER 4, 1987

MONDAY 9/28/87	S. C. Girl Scouts Registration Meeting Adult Volleyball Stage Band	Elem. Cafe. Main Street Gym H. S. Auditorium	7:30-9:00 p.m. 7:00-9:00 p.m. 7:00-9:00 p.m.
TUESDAY 9/29/87	Moriches Bay Power Squadron Boy Scouts Troop 414 Parents Night	Elem. Cafe. Elem. All Purpose Rm. High School Auditorium	7:30-10:00 p.m. 7:20-9:00 p.m. 7:00 p.m.
WEDNESDAY 9/30/87			
THURSDAY 10/1/87	A.C.E. Course PTA Executive Board Meeting	H. S. Library & Rm. 104 Board Room	6:00-9:00 p.m. 7:30-9:00 p.m.
FRIDAY 10/2/87			
SATURDAY 10/3/87	C. M. Youth Soccer	H. S. Fields	12:00-5:00 p.m.
SUNDAY 10/4/87	C. M. Youth Soccer	H. S. Fields/	12:00-5:00 p.m.

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CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF OCTOBER 12-18, 1987

MONDAY 10/12/87	SCHOOL CLOSED		
TUESDAY 10/13/87	Special Education Parents Support Group Moriches Bay Power Squadron Student Council Men's Basketball Boy Scouts of America English Enrichment Course	Elem. Teachers Lounge Elem Cafeteria H. S. Room 103 Main St. Gym Elem. All Purpose Room H.S. Library	7:30-10:30 p.m. 7:30-10:00 p.m. 7:00-9:00 p.m. 7:00-9:00 p.m. 7:30-9:00 p.m. 7:00-9:00 p.m.
WEDNESDAY 10/14/87	Moriches Area Men's Basketball League Brownie Troop #1721	Main St. Gym Elem. Cafeteria A	6:30-9:30 p.m. 6:30-7:45 p.m.
THURSDAY 10/15/87	Cub Scout Webelo Den Meeting Men's Basketball A.C.E. Course	Elem. Cafeteria Main St. Gym H.S. Library & Rm. 104	7:00-9:30 p.m. 7:00-9:00 p.m. 6:00-9:00 p.m.
FRIDAY 10/16/87	[Illegible]	[Illegible]	[Illegible]
SATURDAY 10/17/87	[Illegible]	H.S. Fields H.S. Fields	12:00-5:00 p.m. 12:00-6:00 p.m.
SUNDAY 10/18/87	C.M. Youth Soccer Women's Soccer	H.S. Fields H.S. Fields	12:00-5:00 p.m. 4:00-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF OCTOBER 19-25, 1987

MONDAY 10/19/87	Stage Band Cub Scouts of America	[Illegible]	7:00-9:00 p.m. 2:30-3:30 p.m.
TUESDAY 10/20/87	Moriches Bay Power Squadron Girl Scout Recruitment Boy Scout Troop 414 Men's Basketball	Elem. Cafeteria A Elem. Cafeteria B Elem. All Purpose Room Main Street Gym	7:30-10:00 p.m. 7:00-9:00 p.m. 7:30-9:00 p.m. 7:00-9:00 p.m.
WEDNESDAY 10/21/87	Moriches Area Men's Basketball Brownie Troop #1721 H.E.L.P. Meeting	Main St. Gym Elem. Cafeteria A Elem. Cafeteria B	6:30-9:30 p.m. 6:30-7:45 p.m. 8:00-10:00 p.m.
THURSDAY 10/22/87	Webelo Den Meeting Men's Basketball A.C.E. Course	Elem. Cafeteria Main St. Gym H.S. Library & Rm. 104	7:00-8:30 p.m. 7:00-9:00 p.m. 6:00-9:00 p.m.
FRIDAY 10/23/87			
SATURDAY 10/24/87	C.M. Youth Soccer	H.S. Fields	12:00-5:00 p.m.
SUNDAY 10/25/87	C.M. Youth Soccer Women's Soccer	H.S. Fields H.S. Fields	12:00-5:00 p.m. 4:00-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF NOVEMBER 16-22, 1987

MONDAY 11/16/87	Stage Band Moriches Choral Society Cub Scouts Adult Volleyball	H. S. Auditorium H. S. Music Room Elem. Cafeteria Main St. Gym	7:00-9:00 p.m. 7:30-10:00 p.m. 2:30-3:30 p.m. 7:00-9:00 p.m.
TUESDAY 11/17/87	Moriches Bay Power Squadron Men's Basketball Student Council Dinner for Mr. Symanski	Elem. Cafeteria Main St. Gym H.S. Cafeteria & Home Ec. Rm.	7:30-10:00 p.m. 7:00-9:00 p.m. 5:30-8:30 p.m.
WEDNESDAY 11/18/87	G. S. Brownie Troop 1721 Moriches Area Basketball League H.E.L.P. Meeting Cub Scouts Awards Night Board of Education	Elem. Cafeteria A. Main St. Gym Elem. Cafeteria H. S. Auditorium Board Room	6:30-7:45 p.m. 6:30-9:30 p.m. 8:00-10:00 p.m. 7:00 p.m. 8:30 p.m.
THURSDAY 11/19/87	Men's Basketball Cub Scout Webelos A.C.E. Course P.T.A. Spec. Ed. Support Group Manorville Humane Society C. M. Nursery School General Meeting	Main St. Gym Elem. Cafeteria H. S. Library & Rm. 104 Elem. Teachers Lounge H. S. Cafeteria Main St. Gym	7:00-9:00 p.m. 7:00-9:00 p.m. 6:00-9:00 p.m. 7:30-10:30 p.m. 7:00-11:00 p.m. 7:15-9:15 p.m.
FRIDAY 11/20/87			
SATURDAY 11/21/87	C. M. Youth Soccer	H. S. Fields	12:00-5:00 p.m.
SUNDAY 11/22/87	C. M. Youth Soccer Women's Soccer	H. S. Fields H. S. Fields	12:00-5:00 p.m. 4:00-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF DECEMBER 7-13, 1987

MONDAY 12/7/87	Stage Band Moriches Choral Society Cub Scouts Adult Volleyball S. C. G. S. Leaders Reg. Mtg.	H. S. Auditorium H. S. Music Room Elem. Cafeteria Main St. Gym Elem. All Purpose Room	7:30-9:30 p.m. 7:30-10:00 p.m. 2:30-3:30 p.m. 7:00-9:00 p.m.
TUESDAY 12/8/87	Moriches Bay Power Squadron Men's Basketball Student Council B. S. A. Troop 414	Elem Cafeteria Main St. Gym H. S. Room 103 Elem. All Purp. Room	7:30-10:00 p.m. 7:00-9:00 p.m. 7:00-9:00 p.m. 7:30-9:00 p.m.
WEDNESDAY 12/9/87	Brownie Troop 1721 Moriches Area Basketball League	Elem. Cafeteria A. Main St. Gym	6:30-7:45 p.m. 6:30-9:30 p.m.
THURSDAY 12/10/87	Men's Basketball Cub Scouts Webelos A.C.E. Course	Main St. Gym Elem. Cafeteria H. S. Library & Rm 104	7:00-9:00 p.m. 7:00-8:30 p.m. 6:00-9:00 p.m.
FRIDAY 12/11/87			
SATURDAY 12/12/87	M.Y.O. Boys' Basketball Interact Flea Market	Main St. Gym H. S. Cafeteria & Lobby	9:00-3:00 p.m. 8:00-5:00 p.m.
SUNDAY 12/13/87	Women's Soccer	H. S. Fields	12:00-5:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF DECEMBER 21-27, 1987

MONDAY 12/21/87	Stage Band Cub Scouts Adult Volleyball	H.S. Auditorium Elem. Cafeteria Main St. Gym	7:30-9:30 p.m. 2:30-3:30 p.m. 7:00-9:00 p.m.
TUESDAY 12/22/87	Men's Backetball B.S.A. Troop 414 Student Council Mtg.	Main St. Gym Elem. All Purp. Rm. H.S. Rm 103	7:00-9:00 p.m. 7:30-9:00 p.m. 7:00-9:00 p.m.
WEDNESDAY 12/23/87	Brownie Troop 1721 Moriches Area Basketball League	Elem. Cafeteria A Main St. Gym	6:30-7:45 p.m. 6:30-9:30 p.m.
THURSDAY 12/24/87	HAPPY HOLIDAYS!		
FRIDAY 12/25/87	SCHOOLS CLOSED		
SATURDAY 12/26/87			
SUNDAY 12/27/87			

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF JANUARY 4-10, 1988

MONDAY 1/4/88	Stage Band Adult Volleyball S.C.G.S. Leaders Mtg. Cub Scout Den Mtg.	H.S. Auditorium Main St. Gym Elem. Cafe. A Elem. Cafe	7:00-9:00 p.m. 2:30-3:30 p.m.
TUESDAY 1/5/88	Student Council Men's Basketball B.S.A. Troop 414	H.S. Rm 103 Main St. Gym Elem. All Purpose Rm.	7:00-9:00 p.m. 7:00-9:00 p.m. 7:30-9:00 p.m.
WEDNESDAY 1/6/88	Brownie Troop 1712 Moriches Area Men's Basketball	Elem. Cafe. A Main St. Gym	6:30-7:45 p.m. 6:30-9:30 p.m.
THURSDAY 1/7/88	PTA Executive Board Mtg. A.C.E. Course Men's Basketball	Board Room H.S. Library & Rm 104 Main St. Gym	7:30-9:30 p.m. 6:00-9:00 p.m. 7:00-9:00 p.m.
FRIDAY 1/8/88	Board of Education Executive Session	Board Room	7:30 p.m.
SATURDAY 1/9/88	M.Y.O. Boys' Basketball	Main St. Gym	9:00 a.m.-3:00 p.m.
SUNDAY 1/10/88			

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 8/27/87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
S.C. Girl Scouts—Moriches Service Unit

TYPE OF ACTIVITY
G.S. Leaders' Regular Monthly Meeting

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	✔	Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
Regular Leaders' meeting first Monday of every month

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
None

* * * *

FOR OFFICE USE ONLY

Approved * [large check across application]
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 7/31/87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Boy Scouts of America Troop 414

TYPE OF ACTIVITY
Regular weekly troop meetings

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room	Elem.	Auditorium	
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
Troop meetings—to go over various scouting skills & scouting programs

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
—None—

* * * *

FOR OFFICE USE ONLY

Approved *
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 9-2-87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Cub Scout Pack 23

TYPE OF ACTIVITY
Pack meeting

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room	1	Auditorium	
Classroom		Fields	
Gymnasium	2	Other	

* * * *

PURPOSE (Give specific purpose)
Monthly pack meeting

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
—No fee charged—

* * * *

FOR OFFICE USE ONLY

Approved * [large check across application]
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 10/2/87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Sunrise District Boy Scouts of America

TYPE OF ACTIVITY
1988 Boy Scout Exposition of Sunrise District

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom		Fields	xx
Gymnasium		Other	1 bathroom facility

* * * *

PURPOSE (Give specific purpose)
Final set up for Expo '88 on Saturday, 5/7/88

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved
Modified

s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 3-23-88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Myo-Mastic Sports Club

TYPE OF ACTIVITY
Soccer game

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	_____	Library	_____
All Purpose Room	_____	Auditorium	_____
Classroom	_____	Fields H.S. JV soccer-field	
Gymnasium	_____	Other	_____

* * * *

PURPOSE (Give specific purpose)
Soccer game

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
None

* * * *

FOR OFFICE USE ONLY

Approved * [large check across application]
Disapproved _____ /s/ Rec'd phone approval from Mrs. Schoener
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 4/18/88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
PTA

TYPE OF ACTIVITY
General meeting

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	_____	Library	✔
All Purpose Room	_____	Auditorium	_____
Classroom	_____	Fields	_____
Gymnasium	_____	Other	_____

* * * *

PURPOSE (Give specific purpose)
Meeting on fire prevention

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 3 21 88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Pack 23 Cub Scouts, Center Moriches

TYPE OF ACTIVITY
Monthly meeting

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium ½ (girls side)		Other	

* * * *

PURPOSE (Give specific purpose)
Monthly meeting with parents & pinewood derby

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 2-6-88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Southern Harmonize Gospel Singing

TYPE OF ACTIVITY
Gospel Singing Show

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	✔
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
to donating money to the Black Scholarship Program

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
8-10 dollars per person

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved
Modified

s [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 2 9 88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Expo '88 Committee

TYPE OF ACTIVITY

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	Lunchroom B	Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	Elem. Faculty Rm.

* * * *

PURPOSE (Give specific purpose)
General meeting for May Expo.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
No.

* * * *

FOR OFFICE USE ONLY

Approved * (large check across application)
Disapproved _____ s/ (Illegible)
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 2-5-88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
C.M. PTA

TYPE OF ACTIVITY
Gen meeting

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	x
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
Gen. meeting on Aids

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * (large check across application)
Disapproved _____ /s/ (Illegible)
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 10-27-87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
C M PTA

TYPE OF ACTIVITY
General meeting

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	1
All Purpose Room	2	Auditorium	
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
Discussion on AIDS

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
None

* * * *

FOR OFFICE USE ONLY

Approved * [large check across application]
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Oct 8, 1987

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Moriches Bay Civic Association

TYPE OF ACTIVITY
public meeting on affairs (civic) of the community

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room	✓	Auditorium	
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
to continue discussion on actions to be followed regarding ways of maintaining community standards.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
No fee

* * * *

FOR OFFICE USE ONLY

Approved *
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 9-29-87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Brownie Troop #1719

TYPE OF ACTIVITY
Girl Scouts

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)			
Cafeteria	(A) 1	Library	
All Purpose Room		Auditorium	
Classroom	2	Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
Girl Scout Organization

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
Dues are charged $1.00 per Brownie. These dues are specifically for G.S. activities and functions.

* * * *

FOR OFFICE USE ONLY

Approved *
Disapproved /s/ [Illegible]
Modified Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Aug 30, 1987

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
H.E.L.P. (Helping Every Living Person)

TYPE OF ACTIVITY
Community minded non profit organization

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)			
Cafeteria	✔	Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
Meetings on how we can help needy families in our communitys

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved *
Disapproved /s/ [Illegible]
Modified Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Nov. 19, 1987

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Southern Harmonizing Gospel Group
(Center Moriches)

TYPE OF ACTIVITY
Gospel singing

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cancelled
orig form lost in transit
group says never notified.
believe lost between DO &
H S office

* * * *

PURPOSE (Give specific purpose)
Concert—Gospel music

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
Scholarship fund [Illegible]

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

COMMENTS: 2 Security Guards at $10.00 per hour

CENTER MORICHES UNION FREE SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 10 2 87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Boy Scout Expo '88 Committee meeting

TYPE OF ACTIVITY
Organizational meeting for EXPO '88

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	____	Library	____
All Purpose Room	____	Auditorium	____
Classroom	____	Fields	____
Gymnasium	____	Other	xx

* * * *

PURPOSE (Give specific purpose)
Meeting to formulate plans for boy scout exposition on Saturday, 5 7 88 (raindate 5 14 88). Meeting subject to approval by Mr. Huey & the Board.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved _____ s [Illegible]
Modified Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 7/21/87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
The Manorville Humane Society

TYPE OF ACTIVITY
Chinese Auction

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	✔	Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
To raise funds for the Manorville Humane Society's work—inducing veterinary care & feeding homeless animals, humane education program; spaying and neutering.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
$3 admission fee will be used for our shelter fund

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Nov. 19

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
PTA S.E. Parent Support Group

TYPE OF ACTIVITY
discussion Parent meeting

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	Teachers lounge

* * * *

PURPOSE (Give specific purpose)
Support group

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * [large check across application]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 10-22-87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
C.M. PTA

TYPE OF ACTIVITY
General PTA meeting

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	x
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	

PURPOSE (Give specific purpose)
Getting in touch with Childrens Feelings

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

FOR OFFICE USE ONLY

Approved * [large check across application]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

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CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 10-3-87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Committee on the Busing Vote

TYPE OF ACTIVITY
Meeting

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room	✓	Auditorium	
Classroom		Fields	
Gymnasium		Other	

PURPOSE (Give specific purpose)
Get together to discuss how petition should be drawn up for Bus vote.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

FOR OFFICE USE ONLY

Approved * [large check across application]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

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CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 7-21-87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Center Moriches Free Public Library

TYPE OF ACTIVITY
Summer reading club party

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room	x	Auditorium	
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
Children who participated in the library's summer reading club are invited to a final program with entertainment

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * x
Disapproved
Modified

/s/ (Illegible)
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 8 27 87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
S.C. Girl Scouts

TYPE OF ACTIVITY
Regular Monthly Leaders' mtg & additional Registration Mtg

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	✔	Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
Regular Monthly Meeting (Sept 14) of G.S. leaders & special Registration Meeting (Sept 28)

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
None

* * * *

FOR OFFICE USE ONLY

Approved * (large check across application)
Disapproved
Modified

/s/ (Illegible)
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 9/1/87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Family Counseling Service

TYPE OF ACTIVITY
School-Community Advisory Group Meeting

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	[Illegible]

* * * *

PURPOSE (Give specific purpose)
Discussion of youth-coordinating programs within the CM school district.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * [large check across application]
Disapproved _____ /s/ [Illegible]
Modified Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date June 15, 1987

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Family Counseling Services

TYPE OF ACTIVITY
Counseling

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room	✓	Auditorium	
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
Family counseling offers its services to youth & their families of Center Moriches

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
NA

* * * *

FOR OFFICE USE ONLY

Approved * [large check across application]
Disapproved _____ /s/ [Illegible]
Modified Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date July 30, 1987

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Moriches Bay Civic Association

TYPE OF ACTIVITY
Organizational meeting to form Civic Asso.

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)			
Cafeterja		Library	
All Purpose Room	✔	Auditorium	
Classroom		Fields	
Gymnasium	✔	Other	

* * * *

PURPOSE (Give specific purpose)
To attempt the formation of a civic organization

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
No

* * * *

FOR OFFICE USE ONLY

Approved * [large check across application]
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 1 14 87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Moriches Youth Org.

TYPE OF ACTIVITY
Girls Soccer

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)			
Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom		Fields	Soccer
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
Girls Soccer League fields used for home games

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

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CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 7-17-86

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION

TYPE OF ACTIVITY
adult Volleyball

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	____	Library	____
All Purpose Room	____	Auditorium	____
Classroom	____	Fields	____
Gymnasium	✔	Other	____

* * * *

PURPOSE (Give specific purpose)
adult volleyball

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * ____
Disapproved ____ /s/ [Illegible]
Modified ____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 6/5/87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Summer soccer Program

TYPE OF ACTIVITY
Soccer

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	____	Library	____
All Purpose Room	____	Auditorium	____
Classroom	____	Fields	xx
Gymnasium	____	Other	____

* * * *

PURPOSE (Give specific purpose)

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * [large check across application]
Disapproved ____ /s/ [Illegible]
Modified ____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE SCHOOL DISTRICT

CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 3/24/87

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Brookhaven Kennel Club

TYPE OF ACTIVITY
Dog obedience & Breed Handling Classes

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom		Fields	✔
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
to make the average Dog owner a more responsible owner & train Dogs for Dog shows

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
to Pay for the Instructor on BKC Judge & Supplies

* * * *

FOR OFFICE USE ONLY

Approved *	✔		
Disapproved		/s	[Illegible]
Modified			Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

PLAINTIFFS EXHIBIT 21
CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES
WEEK OF APRIL 10-16, 1989

Monday	Adult Volleyball	Main St. Gym	7:30-9:00 p.m.
April 10, 1989	Suffolk County Girl Scouts Serv. Unit	Cafeteria	7:30-9:00 p.m.
	PE Dept. Movement Ed. Stations	All purpose room	all day
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
Tuesday	Daisy Girl Scouts	Elem. rm. 20	3:00-4:00 p.m.
April 11, 1989	Boys Scouts Troop 414	Elem. Cafeteria	7:00-9:00 p.m.
	PE Dept. Movement Ed. Stations	All purpose room	all day
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	Men's Basketball	Main St. Gym	7:30-10:00 p.m.
Wednesday	Grumman Basketball	Main St. Gym	8:00-10:00 p.m.
April 12, 1989	Brownie Troop 1721	Elem. Caf. A	6:00-7:00 p.m.
	PE Dept. Movement Ed. Stations	All purpose room	all day
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	PTA General Meeting	Elem. Library	7:00-10:00 p.m.
	Board of Education Regular Meeting	[Illegible]	[Illegible]
Thursday	Brownie Troop 1338	Elem. room 23	2:30-4:30 p.m.
April 13, 1989	Cub Pack 23 Webelos	Gym 1	7:00-8:30 p.m.
	PE Dept. Movement Ed. Stations	All purpose room	all day
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	DECA Volleyball	H.S. gym	6:00-8:00 p.m.
Friday	PE Dept. Movement Ed. Stations	All purpose room	all day
April 14, 1989	CM Basketball	Main St. Gym	5:00-7:00 p.m.
Saturday	MYO Special Soccer & Basketball	Main St. Gym	4:00-6:00 p.m.
April 15, 1989	Billy Taylor Concert	H.S. Aud.	7:00-11:00 p.m.
Sunday	MYO Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.
April 16, 1989	LI Womens Soccer	H.S. Fields	3:30-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF APRIL 24-30, 1989

Monday	Adult Volleyball	Main St. Gym	7:30-9:00 p.m.
April 24, 1989	Suffolk County Girl Scouts Serv. Unit	Cafeteria	7:30-9:00 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
Tuesday	Daisy Girl Scouts	Elem. rm. 20	3:00-4:00 p.m.
April 25, 1989	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	Men's Basketball	Main St. Gym	7:30-10:00 p.m.
	CM SEPTA Parent Mtg.	H.S. Cafeteria	7:30-10:00 p.m.
	Boys Scouts Troop 414	All purpose room	7:00-9:00 p.m.
Wednesday	Grumman Basketball	Main St. Gym	8:00-10:00 p.m.
April 26, 1989	Brownie Troop 1721	Elem. Caf. A	6:00-7:00 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	Moriches Bay Civic Assn.	All purpose room	8:00-10:30 a.m.
Thursday	Brownie Troop 1338	Elem. room 23	2:30-4:30 p.m.
April 27, 1989	Cub Pack 23 Webelos	Gym 1	7:00-8:30 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	CM Fire Dept.	All purpose room	7:00-10:00 p.m.
Friday	CM Basketball	Main St. Gym	5:00-7:00 p.m.
April 28, 1989	CM PTA Prime Time 4th graders	Cafeteria/All purp. rm.	6:00-10:00 p.m.
	Williamsville So. H.S. choir	H.S. aud.	7:00-11:00 p.m.
Saturday	MYO Special Soccer & Basketball	Main St. Gym	4:00-6:00 p.m.
April 29, 1989	CMHS Class of 89 car wash	Elem. parking lot	9:00 a.m.-4:00 p.m.
Sunday	MYO Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.
April 30, 1989	LI Womens Soccer	H.S. field	3:30-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF MAY 1-7, 1989

Monday	Adult Volleyball	Main St. Gym	7:30-9:00 p.m.
May 1, 1989	Suffolk County Girl Scouts Serv. Unit	Cafeteria	7:30-9:00 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	Parents Meeting Gr. 6	All purpose room	6:45-9:00 p.m.
Tuesday	Daisy Girl Scouts	Elem. room 20	3:00-4:00 p.m.
May 2, 1989	Boys Scouts Troop 414	All purpose room	7:00-9:00 p.m.
	5 Dist. Study Meeting	Main St. Gym	7:30 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
Wednesday	Grumman Basketball	Main St. Gym	8:00-10:00 p.m.
May 3, 1989	Brownie Troop 1721	Elem. Caf. A	6:00-7:00 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	Suffolk County Girl Scouts Recruitement	Elem. Caf. B	7:30-9:00 p.m.
	Budget Review Meeting	Board room	7:30 p.m.
Thursday	Brownie Troop 1338	Elem. room 23	2:30-4:30 p.m.
May 4, 1989	PTA Executive Board Meeting	Board room	7:30-10:00 p.m.
	Cub Pack 23 Webelos	Main St. Gym	7:00-8:30 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	CM Fire Dept.	All purpose room	7:00-10:00 p.m.
Friday	CM Basketball	Main St. Gym	5:00-7:00 p.m.
May 5, 1989	CM PTA Fashion Show	HS Gym/Cafeteria	7:00-9:00 p.m.
Saturday	MYO Special Soccer & Basketball	Main St. Gym	4:00-6:00 p.m.
May 6, 1989	Interact Spring Flea Market	Elem. Lawn	7:00 a.m.-5:30 p.m.
Sunday	MYO Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.
May 7, 1989	LI Womens Soccer	H.S. Field	3:30-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF MAY 8-14, 1989

Monday	Adult Volleyball	Main St. Gym	7:30-9:00 p.m.
May 8, 1989	Suffolk County Girl Scouts Serv. Unit	Cafeteria	7:30-9:00 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	PK Dance Recital Rehearsal	HS Aud.	4:30-7:00 p.m.
Tuesday	Daisy Girl Scouts	Elem. room 20	3:00-4:00 p.m.
May 9, 1989	Boys Scouts Troop 414	All purpose room	7:00-9:00 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	Men's Basketball	Main St. Gym	7:30-10:00 p.m.
Wednesday	Grumman Basketball	Main St. Gym	8:00-10:00 p.m.
May 10, 1989	Brownie Troop 1721	Elem. Caf. A	6:00-7:00 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	Budget Review Meeting	Board room	7:30 p.m.
	PTA General Meeting	Elem. Lib.	7:00-10:00 p.m.
Thursday	Brownie Troop 1338	Elem. room 23	2:30-4:30 p.m.
May 11, 1989	Cub Pack 23 Webelos	Main St. Gym	7:00-8:30 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	CM SEPTA Parent Meeting	All purpose room	7:00-10:00 p.m.
Friday	CM Basketball	Main St. Gym	5:00-7:00 p.m.
May 12, 1989			
Saturday	MYO Special Soccer & Basketball	Main St. Gym	4:00-6:00 p.m.
May 13, 1989			
Sunday	MYO Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.
May 14, 1989	LI Womens Soccer	HS Field	3:30-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF MAY 15-21, 1989

Monday	Adult Volleyball	Main St. Gym	7:30-9:00 p.m.
May 15, 1989	Suffolk County Girl Scouts Serv. Unit	Cafeteria	7:30-9:00 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
Tuesday	Daisy Girl Scouts	Elem. room 20	3:00-4:00 p.m.
May 16, 1989	Boys Scouts Troop 414	All purpose room	7:00-9:00 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	Men's Basketball	Main St. Gym	7:30-10:00 p.m.
Wednesday	Grumman Basketball	Main St. Gym	8:00-10:00 p.m.
May 17, 1989	Brownie Troop 1721	Elem. Caf. A	6:00-7:00 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	Board of Education Regular Meeting	Board Room	Exec. 6:00 p.m. Public 7:00 p.m.
	PK Dance Recital Rehearsal	H.S. Aud.	4:30-7:00 p.m.
Thursday	Brownie Troop 1338	Elem. room 23	2:30-4:30 p.m.
May 18, 1989	Cub Pack 23 Webelos	Main St. Gym	7:00-8:30 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	CM Fire Dept.	All purpose room	7:00-10:00 p.m.
	HS Family Night Gr. 7-9	HS Gym	7:30-9:00 p.m.
Friday	CM Basketball	Main St. Gym	5:00-7:00 p.m.
May 19, 1989	Jr. HS Spring Dance	HS Cafeteria	7:30-10:30 p.m.
Saturday	Interact Spring Flea Market	Elem. Lawn	7:00 a.m.-5:30 p.m.
May 20, 1989	Cub Scout Pack 23 Car Wash	Elem. Parking Lot	10:00 a.m.-3:00 p.m.
	MYO Special Soccer & Basketball	Main St. Gym	4:00-6:00 p.m.
Sunday	MYO Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.
May 21, 1989	LI womens Soccer	HS Field	3:30-6:00 p.m.
	PK Dance Recital	HS Aud.	12:30-4:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF MAY 22-28, 1989

Monday May 22, 1989	Adult Volleyball	Main St. Gym	7:30-9:00 p.m.
	Suffolk County Girl Scouts Serv. Unit	Cafeteria	7:30-9:00 p.m.
	CM Basketball	Main St. Gym	5:00-7:00 p.m.
	H.S. Play practice	HS Aud.	6:00-10:00 p.m.
Tuesday May 23, 1989	Daisy Girl Scouts	Elem. room 20	3:00-4:00 p.m.
	Boys Scouts Troop 414	All purpose room	7:00-9:00 p.m.
	Girls H.S. Aerobic Assembly	Main St. Gym	7:00-9:00 p.m.
	H.S. Play practice	HS Aud.	6:00-10:00 p.m.
Wednesday May 24, 1989	Brownie Troop 1721	Elem. caf. A	6:00-7:00 p.m.
	Men's Basketball	All purpose room	8:00-10:00 p.m.
	CM Basketball	Main St. Gym	5:00-700 p.m.
	H.S. Play practice	HS Aud.	6:00-10:00 p.m.
Thursday May 25, 1989	Brownie Troop 1336	Elem. room 23	2:30-4:30 p.m.
	CM Fire Dept.	All purpose room	7:00-10:00 p.m.
	H.S. Play practice	HS Aud.	6:00-10:00 p.m.
	Girls H.S. Aerobic Assembly	Main St. Gym	7:00-9:00 p.m.
Friday May 26, 1989	H.S. Senior Play	HS Aud.	6:00-10:00 p.m.
Saturday May 27, 1989	H.S. Senior Play	HS Aud.	6:00-10:00 p.m.
	MYO Special Soccer & Basketball	Main St. Gym	4:00-6:00 p.m.
Sunday May 28, 1989	MYO Basketball	Main St. Gym	10:00 a.m.-1:00 p.m.
	LI Womens	HS Field	3:30-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF MAY 29-JUNE 4, 1989

MONDAY May 29, 1989	SCHOOLS CLOSED		
TUESDAY May 30, 1989	Daisy Girl Scouts	Elem. rm. 20	3:00-4:00 p.m.
	CM Basketball	Main St. Gym	8:00-10:00 p.m.
	PTA Meet the Candidates Night	All purpose room	7:30-10:00 p.m.
WEDNESDAY May 31, 1989	Public Budget Meeting	Main St. Gym	7:30 p.m.
	Brownie Troop 1721	Elem. Cafe. A	6:00-7:00 p.m.
	Men's Basketball	All purpose room	8:00-10:00 p.m.
THURSDAY June 1, 1989	CM Proposed Booster Club Mtg.	HS Cafe.	7:30-9:30 p.m.
	Brownie Troop 1338	Elem. room 23	2:30-4:30 p.m.
	CM Fire Dept.	All purpose room	7:00-10:00 p.m.
	Girls HS Aerobic Assembly	Main St. Gym	7:00-9:00 p.m.
	PTA Exec. Board Mtg.	Board room	7:30-10:00 p.m.
FRIDAY June 2, 1989	CM Co op Nursey School Sing along	Main St. Gym	6:00-9:00 p.m.
SATURDAY June 3, 1989	CM Drama Club One Act Play	HS Aud.	7:30-9:30 p.m.
	MYO car wash	Elem. Parking Lot	9:00 a.m.-4:00 p.m.
SUNDAY June 4, 1989	LI Womens Soccer	HS Field	3:30-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF JUNE 5-11, 1989

Monday June 5, 1989	Adult Volleyball Suffolk County Girl Scouts Serv. Unit	Main St. Gym Cafeteria	7:30-9:00 p.m. 7:30-9:00 p.m.
Tuesday June 6, 1989	Annual Meeting Brownie Troop 1338 Daisy Girl Scouts Boy Scouts Troop 414	Main St. Gym Cafe. A/All purp. rm. Elem. room 20 Cafe. B	7:30 p.m. 5:30-8:00 p.m. 3:00-4:00 p.m. 7:00-9:00 p.m.
Wednesday June 7, 1989	Annual Budget Vote & Election Men's Basketball Brownie Troop 1721	Main St. Gym All purpose room Cafeteria A	10:00 a.m.-9:00 p.m. 8:00-10:00 p.m. 6:00-7:00 p.m.
Thursday June 8, 1989	CM SEPTA Parent Meeting C.M.H.S. Sports Banquet PE Dept. Safety Town	Elem. Library HS Cafeteria/Aud. All purpose room	7:30-10:00 p.m. 6:00-9:00 p.m. All Day
Friday June 9, 1989	H.S. Band Concert & Art Exhibit PE Dept. Safety Town	HS Gym/Aud. All purpose room	7:00-10:00 p.m. All Day
Saturday June 10, 1989	Chamber of Commerce Annual Duck Race	Elem. Front Lawn	11:00 a.m.-1:00 p.m.
Sunday June 11, 1989	LI womens soccer	HS Field	3:30-6:00 p.m.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF JUNE 12-18, 1989

Monday June 12, 1989	Safety Town	All purpose room	All day
Tuesday June 13, 1989	Safety Town	All purpose room	All day
Wednesday June 14, 1989	Elementary Concert Elementary Art Show Safety Town Candidate Scholarship Interviews	HS Auditorium HS Lobby All purpose room HS principal's Off.	7:00-9:30 p.m. 7:30-9:00 p.m. All day 6:30-9:30 p.m.
Thursday June 15, 1989	MYO Baseball Brookhaven Kennel Club Safety Town	Elem. Field Elem. Field All purpose room	4:30-dark 6:00-dark All day
Friday June 16, 1989	Elementary Graduation Dance Safety Town	Main St. Gym All purpose room	6:30-9:00 p.m. All day
Saturday June 17, 1989	Boy Scouts Troop 414 Car Wash	Elem. parking lot	9:00 a.m.-3:00 p.m.
Sunday June 18, 1989			

CENTER MORICHES UNION FREE SCHOOL DISTRICT
USE OF SCHOOL BUILDING FACILITIES

WEEK OF JUNE 19-25, 1989

Monday June 19, 1989	CM Summer Basketball MYO Baseball Safety Town	Main St. Gym Elem. Field All purpose room	6:00-9:00 p.m. 4:30-Dark All day
Tuesday June 20, 1989	Safety Town CM Summer Basketball MYO Baseball	All purpose room Main St. Gym Elem. Field	All day 6:00-9:00 p.m. 4:30-Dark
Wednesday June 21, 1989	Board of Ed. Meeting Kindergarten Graduation CM Summer Basketball Safety Town MYO Baseball	Board room Main St. Gym Main St. Gym All purpose room Elem. Field	Exec. 6:00 p.m. Pub. 7:30 p.m. 10:00-11:00 a.m. 1:00-2:00 p.m. 6:00-9:00 p.m. All day 4:30-Dark
Thursday June 22, 1989	MYO Baseball Tryouts "C" League Safety Town CM Summer Basketball 6th gr. Rehearsal & Graduation MYO Baseball Brookhaven Kennel Club	Elem. Field All purpose room Main St. Gym HS Gym/Aud. Elem. Field Elem. Field	5:00-7:30 p.m. All day 6:00-9:00 p.m. 11:00 a.m.-9:30 p.m. 4:30-Dark 6:00-Dark
Friday June 23, 1989	CM Summer Basketball MYO Baseball	Main St. Gym Elem. Field	6:00-9:00 p.m. 4:30-Dark
Saturday June 24, 1989	MYO Baseball-Tryouts "C" League	Elem. Field	12:00-5:00 p.m.
Sunday June 25, 1989	MYO Baseball-Tryouts "C" League	Elem. Field	12:00-5:00 p.m.

PLAINTIFFS EXHIBIT 22

CENTER MORICHES UNION FREE SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 11-16-89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
PK Dance School

TYPE OF ACTIVITY
Dance Recital

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	1
Classroom		Fields	
Gymnasium		Other	music rooms

* * * *

PURPOSE (Give specific purpose)
Dance recital

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
Camp Pa Qua Tuck

* * * *

FOR OFFICE USE ONLY

Approved * s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date August 1 1989

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Troop 414 Center Moriches B.S.A.

TYPE OF ACTIVITY
Regular weekly troop meetings

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room	1	Auditorium	
Classroom		Fields	
Gymnasium	2	Other	

* * * *

PURPOSE (Give specific purpose)
Regular weekly troop meetings of Boy Scout troop.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
None

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Jan 3/90

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
SEPTA

TYPE OF ACTIVITY
Board meeting

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	Teachers Room

* * * *

PURPOSE (Give specific purpose)
Board business

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
No

* * * *

FOR OFFICE USE ONLY

Approved * s/ [Illegible]
Disapproved
Modified

/s/ [Illegible] 1/9/90
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date [Illegible]

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
CM SEPTA

TYPE OF ACTIVITY
Karate program

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium	✔	Other	

* * * *

PURPOSE (Give specific purpose)
Karate program

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

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CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date _____

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Center Moriches SEPTA

TYPE OF ACTIVITY
Magic show

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	✔
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
To present a magic show to the general public.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
Money will go towards the drug awareness programs in the EM and HS.

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

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CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date January 15th 1989

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Barbara Rocco Dance & Tumbling

TYPE OF ACTIVITY
Variety show

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room	✔	Auditorium	✔
Classroom		Fields	
Gymnasium		Other	Dressing room

* * * *

PURPOSE (Give specific purpose)

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

[Illegible] Memorial Fund

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 2 26 90

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Family Counseling Service

TYPE OF ACTIVITY
Billy Taylor Concert

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	x
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

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CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Jan. 23, 1990

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Holiday Beach Property Owners Assoc. Inc.

TYPE OF ACTIVITY
Meeting

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium	✔	Other	

* * * *

PURPOSE (Give specific purpose)
Discussion on important financial matter concerning all property owners in Holiday Beach

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
None

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 1/17/31

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Long Island University

TYPE OF ACTIVITY
Intern seminar

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	Board Conference Room

* * * *

PURPOSE (Give specific purpose)
Administration seminar—students are working for state certification public school adm.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
None

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Nov. 22, 1989

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Center Moriches Co-op Nursery School

TYPE OF ACTIVITY
Meeting—general assembly—January

• • • •

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	✔	Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	

• • • •

PURPOSE (Give specific purpose)
For general information

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
None

• • • •

FOR OFFICE USE ONLY

Approved * ✔
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Sept 13, 1989

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Moriches Choral Society

TYPE OF ACTIVITY
Rehearsal

• • • •

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom	Band Room	Fields	
Gymnasium		Other	

• • • •

PURPOSE (Give specific purpose)
Rehearsing "Messiah"

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

• • • •

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved
Modified

/s/ L.J.F.
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 3-15-89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Moriches Pa-Qua-Tuck Squaws

TYPE OF ACTIVITY
Chinese auction

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	__ ✔ __	Library	_____
All Purpose Room	_____	Auditorium	_____
Classroom	_____	Fields	_____
Gymnasium	__ ✔ __	Other	_____

* * * *

PURPOSE (Give specific purpose)
Chinese auction

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
Money made goes Camp Paquatuck

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 10/2/89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Manorville Humane Society

TYPE OF ACTIVITY
Chinese auction

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	__ ✔ __	Library	_____
All Purpose Room	_____	Auditorium	_____
Classroom	_____	Fields	_____
Gymnasium	_____	Other	_____

* * * *

PURPOSE (Give specific purpose)
To raise funds for Manorville Humane Soc.'s work—veterinary care, food for homeless animals, spaying & neutering.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
$3. admission fee will be used for the MHS Shelter Fund.

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

6/9/89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Moriches Bay Power Squadron

TYPE OF ACTIVITY
Boating safety education

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	1	Library	
All Purpose Room		Auditorium	
Classroom	[Illegible]	Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
To instruct boating public in safe boat handling rules of the road, chart work

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
None

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 7/28/89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
B.A.D. (Basketball Against Drugs) [Illegible]

TYPE OF ACTIVITY
Benefit basketball game

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

		Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium	[Illegible]	Other	H.S. Cafe.

* * * *

PURPOSE (Give specific purpose)
All day basketball game to benefit CM H.S. fight against drugs

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
All proceeds will go to CM H.S. fund for substance abuse

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Sep 29, '89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
St. John the Evangelist Church

TYPE OF ACTIVITY
Track Program K-8

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	_____	Library	_____
All Purpose Room	_____	Auditorium	_____
Classroom	_____	Fields	1
Gymnasium	_____	Other	_____

* * * *

PURPOSE (Give specific purpose)
To practice short & long runs on track & long jumps in pit

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Aug. 22, 1989

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Center Moriches Nursery School

TYPE OF ACTIVITY
Fall Festival on front lawn of school

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	_____	Library	_____
All Purpose Room	_____	Auditorium	_____
Classroom	_____	Fields	_____
Gymnasium	_____	Other	[Illegible]

* * * *

PURPOSE (Give specific purpose)
We did this last year as a fun fair for the children —plus we raised $500.00 (Its purpose is fun & fund-raising

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
No admission fee

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 9/6/89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION

TYPE OF ACTIVITY
Administration Internship

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	_____	Library	_____
All Purpose Room	_____	Auditorium	_____
Classroom	_____	Fields	_____
Gymnasium	_____	Other Board Rm Elem.	

* * * *

PURPOSE (Give specific purpose)
Meeting with administrative interns

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * __✔__
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 2-14-89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Town of Brookhaven, Department of Recreation

TYPE OF ACTIVITY
Summer Fun Recreation

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	_____	Library	_____
All Purpose Room	_____	Auditorium	_____
Classroom	3 Elem.	Fields	Elementary
Gymnasium	Elementary	Other	Art/Bathroom

* * * *

PURPOSE (Give specific purpose)

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 3/2/89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Barbara Rocco Dance School

TYPE OF ACTIVITY
Variety show—MYO

• • • •

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	_____	Library	_____
All Purpose Room	_____	Auditorium	✓
Classroom	_____	Fields	_____
Gymnasium	_____	Other	_____

• • • •

PURPOSE (Give specific purpose)
Funds for MYO

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
As per above—MYO

• • • •

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 6/27/89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
V.F.W.

TYPE OF ACTIVITY
Softball game

• • • •

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	_____	Library	_____
All Purpose Room	_____	Auditorium	
Classroom	_____	Fields	Softball
Gymnasium	_____	Other	_____

• • • •

PURPOSE (Give specific purpose)
Annual softball game

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
No fee

• • • •

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date March 13, 1989

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Brookhaven Kennel Club

TYPE OF ACTIVITY
Dog obedience & breed handling classes

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom		Fields	x
Gymnasium		Other	

PURPOSE (Give specific purpose)
To make the average dog owner a better [illegible] & better dog owner & to train the dog to be a better behaved dog.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
Supplies & to pay the trainer

FOR OFFICE USE ONLY

Approved * ✔
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

PLAINTIFFS EXHIBIT 23

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 11-29-88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
PK Dance School

TYPE OF ACTIVITY
Dance recital

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	1 HS
Classroom		Fields	
Gymnasium		Other	music room

PURPOSE (Give specific purpose)
Dance recital & 2 rehearsals see charges below

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
Camp Pa Qua Tuck

FOR OFFICE USE ONLY

Approved * s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date January 6, 1989

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Hampton Council of Churches/
Family Counseling Services

TYPE OF ACTIVITY
Billy Taylor Concert

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	✔
Classroom		Fields	
Gymnasium		Other	Cafeteria

* * * *

PURPOSE (Give specific purpose)
To promote awareness of the family counseling services of the Hampton Council of Churches.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
Offset Expenses—Essentially Non-Profit

* * * *

FOR OFFICE USE ONLY

Approved * s/ [Illegible]
Disapproved _____ /s/ [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 3/8/89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Clayton Huey

TYPE OF ACTIVITY
Intern seminar mtg.

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	Board Rm.

* * * *

PURPOSE (Give specific purpose)
C.W. Post intern seminar mtg.

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved _____ s [Illegible]
Modified _____ Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 11-5-88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Paul Gibson

TYPE OF ACTIVITY
Baseball clinic

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room	2	Auditorium	
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
Non-participating baseball clinic with speakers on several topics

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
Fees to cover surcharge and giveaway items Anything above will be donated to little league.

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved
Modified

s [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date Nov. 21 88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Unkechaug Dance Group

TYPE OF ACTIVITY
Cultural program

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	1	Library	
All Purpose Room	2	Auditorium	
Classroom		Fields	
Gymnasium		Other	access to kitchen?

* * * *

PURPOSE (Give specific purpose)
Raise funds for costumes & materials

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
Dance group

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved
Modified

s [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 1 4 89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Unkechang Dance Group

TYPE OF ACTIVITY
Rehearsals (Extension of original dates)

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	x	Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved
Modified

s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 6 15 88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Moriches Bay Power Squadron

TYPE OF ACTIVITY
Boating safety instruction

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	1	Library	
All Purpose Room		Auditorium	
Classroom	2	Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
To instruct boating public in safe boat handling, rules of the road chart work

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
W.O. admission fee

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved
Modified

s [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 8-18-88

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
Center Moriches Co-op Nursery School

TYPE OF ACTIVITY
Fall festival

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria	2 (if it rains)	Library	
All Purpose Room		Auditorium	
Classroom		Fields	
Gymnasium		Other	1 Front of school

* * * *

PURPOSE (Give specific purpose)
To raise additional money for nursery school as well as an activity for children (games, face painting, pumpkin decorating, pony rides, [Illegible]

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
None—we will charge minimal amounts for a

* * * *

FOR OFFICE USE ONLY

Approved * ✔
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

CENTER MORICHES UNION FREE
SCHOOL DISTRICT
CENTER MORICHES, NEW YORK

APPLICATION FOR USE OF SCHOOL DISTRICT FACILITIES

Date 5-4-89

The undersigned requests approval for use of the school district facilities as indicated below:

NAME OF ORGANIZATION
CM Drama Club

TYPE OF ACTIVITY
3 One act plays

* * * *

FACILITIES REQUESTED: (Check facilities listed below, indicating first and second choices by putting "1" and "2" next to your selection)

FACILITY (Elem. or H.S.)

Cafeteria		Library	
All Purpose Room		Auditorium	[Illegible]
Classroom		Fields	
Gymnasium		Other	

* * * *

PURPOSE (Give specific purpose)
Performance of plays

If Admission Fee is to be charged, state specifically what proceeds are to be expended for:
$1.50 for drama club

* * * *

FOR OFFICE USE ONLY

Approved * /s/ [Illegible]
Disapproved
Modified

/s/ [Illegible]
Authorizing Official

* The approval herein is conditional pending the possibility of a school function being scheduled which must take priority.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 91-2024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

A school district in the state of New York makes its facilities available for community use for "civic, social, and recreational" purposes but forbids use by any group "for religious purposes." The pastor of a local church applied for permission to use school facilities to show a film series about family issues. The school district has denied permission because of the religious content of the film series.

1. Did the Second Circuit err in holding, in conflict with the First, Third, and Fifth Circuits, that a public school district may deny equal access to the use of its facilities during non-school hours solely on the basis of the religious content of the would-be user's speech, without violating with the First Amendment?

2. Did the Second Circuit err in holding, in conflict with the First, Third, Fourth, and Fifth Circuits, that public school facilities that are available for social, civic, and recreational use by the general public are not designated public fora for purposes of the right to free speech under the First Amendment?

3. Is the denial of equal access to public school facilities solely on the basis of the religious content of the would-be user's speech unconstitutional regardless of whether the facilities are "designated public fora," "limited public fora," or "nonpublic fora" for purposes of the right to free speech under the First Amendment?

4. Does the denial of equal access to public school facilities solely on the basis of the religious content of the would-be user's speech violate the Establishment Clause of the First Amendment?

PARTIES

The names of all of the parties to the proceeding in the court below appear in the caption of the case.*

*Petitioner Lamb's Chapel is a non-profit corporation. It has no parent company or subsidiaries.

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IN THE

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OCTOBER TERM, 1992

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LAMB'S CHAPEL and JOHN STEIGERWALD,
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v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR PETITIONERS

DECISIONS BELOW

The decision of the court of appeals is reported as *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381 (2d Cir. 1992) (Pet. App. 1a). The decision of the district court granting summary judgment is reported as *Lamb's Chapel v. Center Moriches Union Free School District*, 770 F. Supp. 91 (E.D.N.Y. 1991) (Pet. App. 16a). The prior decision of the district court denying a preliminary injunction is reported as

Lamb's Chapel v. Center Moriches Union Free School District, 736 F. Supp. 1247 (E.D.N.Y. 1990) (Pet. App. 35a).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment in this case on March 18, 1992. Petitioners filed their petition for writ of certiorari on June 16, 1992. This Court granted the petition on October 5, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The New York statute governing community use of public school facilities, N.Y. Educ. Law § 414 (McKinney 1988 & Supp. 1992), is set forth in Appendix D to the Petition for Writ of Certiorari (Pet. App. 52a).

The regulations of the Center Moriches Union Free School District governing community use of public school facilities are set forth in Appendix E to the Petition for Writ of Certiorari (Pet. App. 56a).

STATEMENT OF THE CASE

This is a case about official content-based and viewpoint-based censorship of religious speech from a forum opened for general social, civic, and recreational use by the public.

Respondent Center Moriches Union Free School District makes its physical facilities available, during non-school hours, for social, civic, recreational, and other activities by members of the local community, but explicitly forbids use "by any group for religious purposes." Rules and Regulations for Community Use of School Facilities [hereinafter, "Rules & Regs."] ##7, 10 (Pet. App. 57a). Petitioners, a church and its pastor, have applied to use Center Moriches school facilities in order to show a film series, "Turn Your Heart Toward Home," by Dr. James Dobson. The school district has denied permission solely because of the religious content of the film series.

In the present action, petitioners seek injunctive and declaratory relief, under 42 U.S.C. § 1983, against the denial of their right to access, on equal terms with other members of the community, to the use of public school facilities.

A. Statement of Facts

Respondent Center Moriches Union Free School District (hereinafter "Center Moriches") is a political subdivision of the State of New York duly organized to provide public education in Suffolk County. Center Moriches controls the use of various public school facilities including auditoriums, cafeterias and other meeting rooms.

New York state law authorizes the use of public school facilities for, *inter alia*, "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" provided that "such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public." N.Y. Educ. Law § 414(1)(c) (McKinney 1988 & Supp. 1992) (Pet. App. 52a).

Pursuant to this statute, Center Moriches has adopted official rules governing community use of school district facilities. These rules explicitly authorize permits for, *inter alia*, "social, civic, or recreational use" when "non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event." Rules & Regs. #10 (Pet. App. 57a). Center Moriches has regularly granted permission to a multitude of groups to conduct activities in school facilities,[1] including the following (taken from the years 1987 through 1990):

Manorville Humane Society (J.A. 125)
Holiday Beach Property Owners Assoc. (J.A. 156)
Moriches Bay Civic Association (J.A. 121)
Unkechaug Dance Group (J.A. 97)
Moriches Choral Society (J.A. 159)
H.E.L.P. (Helping Every Living Person) (J.A. 123)
Chamber of Commerce (J.A. 146)
Center Moriches Co-op Nursery School (J.A. 158)
Custodial Dep't Labor Union (J.A. 30)
Cub Scout Pack 23 (J.A. 112)
PK Dance School (J.A. 149)

[1] The heavy, ongoing use of school facilities for a potpourri of activities by both school groups and outside organizations is plain from the record. During the week of Dec. 5-11, 1988, for example, there were twenty entries on the Center Moriches calendar for approved and scheduled uses of school district facilities. Plaintiffs' Ex. 3 (J.A. 36). This week was by no means atypical. *See id.* (J.A. 43) (March 13-19, 1989—18 uses); Plaintiffs' Ex. 4 (J.A. 55) (Nov. 13-19, 1989—23 uses); *id.* (J.A. 66) (Feb. 5-11, 1990—26 uses).

Committee on the Busing Vote (J.A. 129)
Center Moriches Free Public Library (J.A. 130)
Moriches Pa-Qua-Tuck Squaws (J.A. 160)
Hampton Council of Churches/Family Counseling Services (J.A. 93)
Moriches Bay Power Squadron (J.A. 162)
Moriches Youth Organization (J.A. 135)
St. John the Evangelist Church (J.A. 164)
Music Department/Salvation Army (J.A. 95)
Center Moriches PTA (J.A. 120)
Southern Harmonizers (J.A. 96)
Brownie Troop # 1719 (J.A. 122)
Brookhaven Kennel Club (J.A. 138)
V.F.W. (Veterans of Foreign Wars) (J.A. 169)

Plaintiffs' Exs. 3, 9a, 11a, 12a, 14, 20-22.

The activities these various groups have conducted on school facilities have been likewise multitudinous, including:

—organizational meeting (J.A. 119)
—magic show (J.A. 153)
—musical rehearsal (J.A. 159)
—political organizing (J.A. 129)
—auction (J.A. 160)
—family counseling (J.A. 133)
—fall festival (J.A. 165)
—cultural program (J.A. 175)
—dramatic performance (J.A. 179)
—formation of new organization (J.A. 134)
—athletics (J.A. 114)
—concert (J.A. 117)
—support group (J.A. 127)
—party (J.A. 130)
—instructional classes (J.A. 138)
—topical speeches (J.A. 174)
—recital (J.A. 149)

Plaintiffs' Exs. 20, 22, 23.

Topics addressed at these gatherings on school facilities have reflected a similar broad diversity, including:

—financial matters affecting property owners (J.A. 156)
—AIDS (J.A. 120)
—helping needy families (J.A. 123)
—getting in touch with children's feelings (J.A. 128)
—maintenance of community civic standards (J.A. 121)
—scouting skills and programs (J.A. 111)
—"psychology and the unknown" (J.A. 99)
—fire prevention (J.A. 115)
—busing petition (J.A. 129)
—youth-coordinating programs (J.A. 132)
—dog obedience (J.A. 138)
—boating safety (J.A. 162)
—baseball (J.A. 174)

Plaintiffs' Exs. 16, 20, 22, 23.

The official rules for Center Moriches, however, expressly forbid use of school premises "by any group for religious purposes." Rules & Regs. #7 (Pet. App. 57a).

Petitioner John Steigerwald was, at all times relevant to this litigation, the pastor of an Evangelical Christian Church, petitioner Lamb's Chapel (Pet. App. 17a).[2]

Pastor Steigerwald applied on two separate occasions for permission to use school facilities to show a film series about family issues. Each time, Center Moriches rejected his application because of the religious content of the film.[3]

[2] Steigerwald is currently associate pastor and a member of the governing board of Lamb's Chapel.

[3] Pastor Steigerwald had previously requested use of school facilities to conduct Sunday morning services during 1989. Plaintiffs' Ex. 5a (J.A. 70). On the application Pastor Steigerwald indicated his willingness to abide by the Center Moriches Rules and Regulations "excluding #7" (the ban on use for religious purposes). A school district official replied with a letter, dated Nov. 23, 1988, stating that "in accordance with No. 7 of our currently existing rules and regulations, your request must be denied (see New York Education Law Section 414, which governs the board's

Pastor Steigerwald wrote to Mrs. Alice M. Schoener, business manager and district clerk of Center Moriches (Tr. 60), on Dec. 18, 1988, enclosing an application for the use of school facilities for the presentation of a film series featuring Dr. James Dobson.[4] Plaintiffs' Ex. 6a (J.A. 79-80). The series was to be open to the public, free of charge, and was to run in five parts, one evening each week for five weeks. *Id.* On the application form, Pastor Steigerwald noted that the purpose of the film presentation was "Family emphasis" and "to share some prac|tic|al insight about the family." *Id.* Mrs. Schoener replied, in a letter dated Jan. 18, 1989, as follows:

> [W]e are bound by education law concerning the use of school facilities by religious organizations. Fortunately, we have not, to date, been put to the test of determining when a use of a facility by one of our local churches would constitute "religious purposes." I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations.
>
> . . . .
>
> If you care to pursue your request, please provide a more detailed description of your proposed use (including a brochure describing the film) . . . .

Plaintiffs' Ex. 6b (J.A. 81).

On Feb. 2, 1989, Pastor Steigerwald responded to Mrs. Schoener's request for additional information by sending a brochure describing the planned film series, "Turn Your

position)." Plaintiffs' Ex. 5b (J.A. 78). Pastor Steigerwald has not renewed his request to use school facilities for Sunday services, and his request for such use is not before this Court.

[4] Plaintiffs' Exhibit 6d (J.A. 84) includes a brochure describing the film series. The brochure identifies James C. Dobson, Ph.D., as a licensed psychologist, teacher, author of nine best-selling books, President of Focus on the Family, and host of a daily half-hour radio program broadcast across the country (J.A. 88).

Heart Toward Home." Plaintiffs' Exs. 6c, 6d (J.A. 83, 85). Mrs. Schoener replied, on Feb. 8, 1989, that "[t]his film does appear to be church related and therefore your request must be refused." Plaintiffs' Ex. 6d (J.A. 84).

Pastor Steigerwald submitted another request on Oct. 23, 1989, once more seeking the use of school facilities for the Dr. Dobson film series. Plaintiffs' Ex. 7a (J.A. 90). In response, Mrs. Schoener wrote on Nov. 15, 1989, that "[t]his film does appear to be church related and therefore your request must be refused." Plaintiffs' Ex. 7b (J.A. 92).

Pastor Steigerwald and Lamb's Chapel would be eligible, in general, to use Center Moriches facilities so long as their activities did not have "religious purposes." Mrs. Schoener testified, for example, that Pastor Steigerwald and Lamb's Chapel would be allowed to use school facilities for athletic purposes. Tr. 71. *See also* J.A. 164 (approved application by church to use school facilities for athletic program). The reason Center Moriches has refused Pastor Steigerwald and Lamb's Chapel access to public school facilities to show a film series on families is the religious perspective contained in petitioners' planned film series. Plaintiffs' Exs. 6b, 6d, 7b (J.A. 81, 84, 92).

There is no evidence that Center Moriches refused any applications to use its facilities prior to rejecting Lamb's Chapel's requests to show a film series.

B. Course of Proceedings

Lamb's Chapel and John Stiegerwald (collectively, "Lamb's Chapel") filed suit in federal district court on February 9, 1990, naming as defendants both Center Moriches Union Free School District and Louise Tramontano in her official capacity as president of the Board of Education for Center Moriches Schools (collectively, "Center Moriches"). Lamb's Chapel requested an injunction requiring Center Moriches to let Lamb's Chapel use

school facilities to show the planned Dr. Dobson film series and forbidding Center Moriches from discriminating against religious groups "because of the religious content . . . of their speech." Complaint ¶ 36 (J.A. 13). Lamb's Chapel also sought a declaration that Center Moriches had created an "open forum," had engaged in unconstitutional content discrimination against Lamb's Chapel's speech and religious beliefs, had violated Lamb's Chapel's federal constitutional rights to free speech, freedom of assembly, equal protection, and free exercise of religion, and had violated the Establishment Clause of the First Amendment. *Id.* ¶ 37 (J.A. 13-14).

Center Moriches responded by relying upon section 414 of the New York Education Law. Center Moriches alleged that this statute precludes the use of school district premises for religious purposes,[5] Answer ¶ 39 (J.A. 21), and that the school district's official rules governing the use of Center Moriches facilities (including the ban on uses for religious purposes) were in conformity with section 414, *id.* ¶¶ 36, 54 (J.A. 20, 23). Center Moriches denied that it had created an open forum and maintained that its Board of Education "controlled" the use of school facilities. *Id.* ¶¶ 42, 45 (J.A. 21, 22). Finally, Center Moriches claimed that it had a "compelling interest" in protecting elementary and secondary students from "proselytizing religious ideas of various religious groups and entities," and that section 414 furthered that government interest. *Id.* ¶¶ 48, 49 (J.A. 22).

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[5] Section 414 does not expressly forbid the use of school premises for religious purposes. *See* Appendix D to Petition for Writ of Certiorari (Pet. App. 52a) (text of statute). A New York appellate court, however, has construed section 414 to authorize the use of school facilities only for "enumerated purposes" and has concluded that because the statute does not explicitly list "religious purposes," no such use is authorized. *Trietley v. Board of Educ.*, 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978).

On May 18, 1990, the U.S. District Court for the Eastern District of New York denied Lamb's Chapel's motion for a preliminary injunction. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 736 F. Supp. 1247 (E.D.N.Y. 1990) (Pet. App. 35a).

Lamb's Chapel appealed from the denial of the preliminary injunction. At the suggestion of Staff Counsel for the Second Circuit, however, Lamb's Chapel withdrew its appeal and returned to the district court to obtain a final disposition and to allow the district court to reconsider its denial of injunctive relief in light of *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). *See* Pet. App. 17a.

Upon return of the litigation to the district court, Center Moriches clarified in its motion for summary judgment that it relied ultimately upon section 414 of the New York Education Law for its defense:

> In the absence of Section 414 of the Education Law establishing a clear State policy, we would concede that the School District would be obligated to allow access to the facilities for religious groups on the same basis as any other group may be allowed access. However, in the face of Section 414 which limits the access that can be permitted to school district facilities, it is clear that the State has established a policy of precluding use for nonpermitted purposes.

Mem. in Support of Motion for Summary Judgment at 15 (Nov. 15, 1990).

The district court granted summary judgment for Center Moriches. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 770 F. Supp. 91 (E.D.N.Y. 1991) (Pet. App. 16a).

Lamb's Chapel appealed to the U.S. Court of Appeals for the Second Circuit. On March 18, 1992, that court affirmed the entry of summary judgment against Lamb's Chapel. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381 (2d Cir. 1992) (Pet. App. 1a).[6]

The Second Circuit ruled that public property may be either a "traditional public forum," a "purposefully opened" public forum (including a "subcategory" of "limited" or "designated" public fora), or a "non-public" forum. *Id.* at 385-86 (Pet. App. 8a-9a). The court of appeals held that Center Moriches school facilities fall "within the subcategory of 'limited public forum,' the classification that allows it to remain non-public except as to specified uses." *Id.* at 386 (Pet. App. 10a) (citation omitted).

The court of appeals observed that while New York Education Law section 414 authorizes a variety of uses for public school property, including social, civic and recreational meetings, *id.*, "[r]eligious uses are nowhere permitted in this enumeration," *id.* The court noted that in a prior decision, *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 680 (2d Cir. 1988), the Second Circuit had "adopted a state court interpretation of section 414 that the use of New York school facilities is confined to nonreligious purposes," *Lamb's Chapel*, 959 F.2d at 387 (Pet. App. 10a-11a) (citing *Trietley v. Board of Educ.*, 65 A.D.2d 1, 5-6, 409 N.Y.S.2d 912, 915 (1978) ("Religious purposes are not included in the enumerated purposes for which a school may be used under section 414 . . . . Consequently, the Board of Education had no authority to grant petitioners' request to form bible clubs in the public high schools")).[7]

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[6] The New York State Attorney General's Office, which was not a party in the district court, intervened on appeal. *See* J.A. 2 (docket entry for order allowing intervention).

[7] The *Trietley* decision predated both *Widmar v. Vincent*, 454 U.S. 263 (1981) (granting equal access, under First Amendment, to university facilities for student religious group), and *Board of*

Pursuant to *Trietley* and *Deeper Life*, the Second Circuit construed section 414 to render public school facilities "a limited public forum from which religious uses would be excluded." *Lamb's Chapel*, 959 F.2d at 387 (Pet. App. 11a) (citation omitted).

Relying upon *stare decisis* with respect to its own precedents, the court of appeals held that in a "limited public forum," government may "impose a blanket exclusion on certain types of speech" so long as it does not "selectively deny access" among "expressive activities of a certain genre," *id.* (internal quotation marks omitted) (citing *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, 692 (2d Cir. 1991)). The court held that the only remaining question was whether Center Moriches "has opened its facilities to religious uses and purposes" in the present case. 959 F.2d at 387 (Pet. App. 12a). Declaring this to be "a close question," *id.*, the court reviewed the evidence and concluded that "none of the prior uses" of Center Moriches property "were for religious purposes." *Id.* at 388 (Pet. App. 14a).

The court of appeals did not explain why Lamb's Chapel's planned film series would not be of the same "genre" as social, civic, recreational, or other permitted uses. Nor did the court identify any government interest —compelling, substantial, or even rational—that allegedly supported the exclusion of private users from government facilities solely on the basis of the religious content or purposes of the intended use.

Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) (granting equal access, under federal Equal Access Act, to high school facilities for student religious group). *Trietley* rejected an equal access claim by a high school student bible club. In *Deeper Life*, which also predated *Mergens*, the Second Circuit held that religious groups have no constitutional right of equal access *in general* to public school facilities, but that where—as in *Deeper Life*—the school district has *in fact* permitted prior *religious* uses, other religious groups may have a valid claim to equal treatment.

SUMMARY OF ARGUMENT

Petitioner Lamb's Chapel requested permission to use the facilities of respondent Center Moriches Union Free School District, in order to show a film series, open to the public, on contemporary family issues. Center Moriches refused permission solely because the film series contained a religious perspective. This censorship of religious speech of private actors violates the federal constitutional right to free speech.

A government body creates a "designated public forum" for free speech when it opens government facilities to general use by the public or some segment of the public. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Content-based exclusions of speech from such fora are subject to strict scrutiny, i.e., such exclusions are unconstitutional unless narrowly drawn to further a compelling government interest. *Id.* at 45-46.

The Center Moriches school district has, by policy and practice, opened its facilities to a very broad range of outside uses, thereby creating a designated public forum. The school district forbids users of its facilities from engaging in religious speech. This content-based censorship therefore triggers strict scrutiny.

No compelling interest supports the school district's policy of censorship. Granting religious speakers equal access to school facilities does not violate the Establishment Clause. *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). The school district claims that a state statute requires the school district to forbid even private religious speech on school premises. But state law cannot justify the denial of the federal constitutional right to equal access for private religious speech. *Widmar*, 454 U.S. at 276.

The Second Circuit held that Center Moriches was nevertheless free to create a "limited public forum from which religious uses would be excluded." 959 F.2d at 387 (Pet. App. 11a). This holding represents a major distortion of this Court's forum jurisprudence.

Contrary to the Second Circuit, there is no special "subcategory" of religion-free fora. Such a concept is inconsistent with this Court's precedents, inherently circular, and completely unworkable. Administration of such gerrymandered fora would require school officials and judges to screen private party speech to determine whether that speech had religious content (and how much). This sort of subjective, standardless review involves unconstitutionally broad discretion and creates an impermissible risk of *de facto* discrimination between different religions. This Court should forcefully reject the notion that a government body may censor out the religious speech of private parties, so long as it does so "consistently."

The undisputed record establishes that Lamb's Chapel is eligible, in general, to use Center Moriches facilities, and that the topic Lamb's Chapel wishes to address—contemporary family concerns—is well within the scope of permissible subject matter in the relevant forum. Hence, the Center Moriches facilities are a public forum as to Lamb's Chapel, *Widmar*, 454 U.S. at 267, and the school district's content-based exclusion of Lamb's Chapel triggers—and fails—strict scrutiny, *id.* at 267-70.

The Center Moriches policy of anti-religious discrimination would also be unconstitutional even if the facilities in question were deemed "nonpublic fora" for purposes of free speech. In a nonpublic forum, government may limit access "based on *subject matter* and *speaker identity* so long as the distinctions drawn are *reasonable* in light of the purpose served by the forum and are *viewpoint-neutral*," *Cornelius v. NAACP Legal Defense*

and Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (emphasis added). But in the present case, Center Moriches has no restriction applicable to either the subject matter (family issues) or the speaker (an outside church organization) in question. Instead, Center Moriches has enforced a restriction which is *unreasonable* and constitutes *viewpoint* discrimination (censoring out speech solely because of its religious *perspective*). Hence, the school district's policy fails even the test for nonpublic fora.

Even aside from forum analysis, the Center Moriches policy violates the First Amendment. The school district has engaged in content-based censorship of pure speech, which is presumptively unconstitutional. Religious speech is entitled to full and equal protection under the First Amendment. The school district's censorship of religious speech triggers strict scrutiny, a standard the school district's policy cannot satisfy.

Finally, by targeting private religious speech for censorship from facilities made available to the public, Center Moriches has violated the Establishment Clause of the First Amendment. Government denial of equal access for religious speech demonstrates hostility toward religion, *Mergens*, 496 U.S. at 248 (plurality); furthermore, the screening involved in a policy of religious censorship produces excessive entanglement of government officials with religious questions, *id.*, *Widmar*, 454 U.S. at 272 n.11.

ARGUMENT

It is a fundamental proposition of constitutional law that a government body may not suppress or exclude the speech of private parties for the sole reason that the speech contains a religious perspective. *Widmar v. Vincent*, 454 U.S. 263 (1981). To deny this bedrock principle would be to eviscerate the essential guarantees of free speech and religious freedom under the First Amendment.

This case presents the specific question whether a public school district, which makes its facilities generally available for the activities of non-school community groups during non-school hours, may deny permission to use school facilities to show a film solely because of the religious content of that film. The Second Circuit erroneously upheld precisely such content-based discrimination against religious speech. This Court must reverse that judgment.

Petitioner Lamb's Chapel wishes to show a film series on issues confronting modern families. If this *same* entity (Lamb's Chapel) were to seek to address the *same* topic (contemporary family issues) through the *same* medium (a film series), with the single difference that the film omitted all references to a religious perspective, Center Moriches would have no objection to the use of its facilities under the same terms as any other use by outside groups. But because the film series includes a religious point of view, Center Moriches has refused permission to show the film. This is blatant and unconstitutional government censorship of private religious speech.

I. THE DISCRIMINATORY EXCLUSION OF PRIVATE RELIGIOUS SPEECH FROM A FORUM SOLELY ON THE BASIS OF ITS CONTENT IS UNCONSTITUTIONAL REGARDLESS OF THE NATURE OF THE FORUM.

The Second Circuit held that the school facilities of Center Moriches are not public forum property for purposes of free speech, even though Center Moriches has

made these facilities available, by policy and practice, for a virtually limitless variety of social, civic, and recreational uses by the local community. This holding is inconsistent with the public forum jurisprudence of this Court under the First Amendment. But even if the school facilities in question did not constitute public fora, the school district's discriminatory exclusion of religious speech would still be unconstitutional.

This Court regularly employs "forum" analysis in resolving claims of access to public property for purposes of free speech. *See, e.g., Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) ("we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic"). There are "three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 802. Traditional public fora include property, such as public streets and parks, traditionally open to assembly and debate. *Id.* Designated public fora are facilities "not traditionally open to assembly and debate as a public forum" which government has "intentionally open[ed] . . . for public discourse." *Id.* Examples of designated public fora include university facilities made available for meetings of student groups, *Widmar v. Vincent*, 454 U.S. 263 (1981), municipal theaters made available for private dramatic productions, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), and school board meetings opened for citizen input, *Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). Nonpublic fora comprise property which is not by tradition or designation a forum for public communication, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), such as jailhouse grounds, *Adderley v. Florida*, 385 U.S. 39 (1966).

Under the principles this Court has enunciated in prior cases, the school district facilities are "designated public fora" for purposes of free speech. It follows that the school district's content-based exclusion of religious speech triggers strict scrutiny, a constitutional standard that this school district policy cannot satisfy. But even if the facilities were deemed to be "nonpublic" fora, the school district's policy could not meet the governing constitutional standards.

A. The Center Moriches Policy Represents Unconstitutional Content-Based Discrimination Against Speech in a Designated Public Forum.

The school district facilities at issue here are designated public fora. The district's selective, content-based exclusion of religious speech therefore triggers strict scrutiny, i.e., the school district must demonstrate that its policy of religious discrimination is narrowly drawn to further some compelling government interest. The school district's policy in the present case fails this rigorous standard and is therefore unconstitutional.

1. *The Center Moriches school facilities are designated public fora.*

Public school facilities become designated public fora when "school authorities have 'by policy or practice' opened those facilities 'for *indiscriminate use by the general public*,' . . . or by some segment of the public, such as student organizations." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (emphasis added; citation omitted).

In the present case, both policy *and* practice compel the conclusion that the facilities at issue are designated public fora.

a. *Policy*

New York state law explicitly authorizes "social, civic, and recreational" use of school facilities by the community. N.Y. Educ. Law § 414(1)(c) (Pet. App. 53a).

Pursuant to this statute, the official policy of Center Moriches likewise makes school facilities available for "social, civic, or recreational use." Rules & Regs. # 10 (Pet. App. 57a). Thus, by its official policy, Center Moriches has created "a forum generally open to the public," *Perry*, 460 U.S. at 45, i.e., a designated public forum, *id.* Indeed, it would be difficult to imagine a more expansive use policy than one explicitly open to any "social, civic, or recreational use."

b. *Practice*

It has been the consistent practice of Center Moriches to allow a wide diversity of outside groups to use its facilities. *See supra* pp. 4-5. *See also* J.A. 25, 26, 93, 95-99, 110-38, 149-79 (samples of groups approved for use of school facilities). Everyone from the local humane society, to a labor union, to the girl scouts, have been permitted to use school facilities for a potpourri of purposes and activities. In fact, there is no evidence that Center Moriches denied access to *anyone* before it refused Lamb's Chapel's request to show a film series. This is a classic example of "indiscriminate use by the general public," *Hazelwood*, 484 U.S. at 267.

Thus, both policy and practice demonstrate that the Center Moriches school facilities are designated public fora.[8]

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[8] Applying this same logic, the federal courts of appeals for the First, Third, Fourth, and Fifth Circuits have held that school facilities made available for social, civic, and recreational use by outside groups are designated public fora subject to the strict standards governing public fora. *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc); *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978). District courts in at least three other federal circuits have held the same. *Knights of the Ku Klux Klan v. Martin Luther King Jr. Wor-*

2. *The content-based exclusion of speech from a designated public forum triggers strict scrutiny.*

Government authorities may not exclude otherwise eligible speakers from designated public fora solely on the basis of the *content of their speech* unless the selective exclusion "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270 (citation omitted). *Accord Perry*, 460 U.S. at 46. Such content-based censorship will be, in all but the most exceptional circumstances, inevitably unconstitutional:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of this forbidden censorship is content control. . . .
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972) (citations omitted).

The Center Moriches policy is therefore subject to "strict scrutiny," i.e., that policy is unconstitutional unless narrowly drawn to further some compelling government interest.

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shippers, 735 F. Supp. 745, 752 (M.D. Tenn. 1990); *Wallace v. Washoe County School Dist.*, 701 F. Supp. 187 (D. Nev. 1988); *Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983). Petitioners are aware of no federal court outside of the Second Circuit that has held to the contrary.

3. *The Center Moriches policy of religious censorship furthers no compelling interest; hence, the policy fails to satisfy strict scrutiny.*

Center Moriches has proferred no compelling interests that could justify its content-based exclusion of religious speech.

a. *There are no compelling Establishment Clause concerns.*

In its answer, Center Moriches asserted a "compelling interest" in "protecting" its students from "proselytizing religious ideas." Answer ¶¶ 48, 52 (J.A. 22, 23). Center Moriches has apparently abandoned this argument, and with good reason: it has no force in this case. Permitting religious speakers equal access to a designated public forum is completely compatible with the Establishment Clause of the First Amendment.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court held that granting student religious groups equal access to university facilities would not violate the Establishment Clause; accordingly, that Clause provided no valid justification for the denial of equal access to religious groups. *Id.* at 270-76.

The fact that the present case involves high school facilities makes no difference. In *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), this Court held that equal access by *high school students* to school facilities for religious purposes was fully compatible with the Establishment Clause. It follows *a fortiori* that equal access by members of the *general public* to school facilities raises no concern under the Establishment Clause.

b. *State law cannot supersede federal constitutional rights.*

Center Moriches relies primarily upon state law to justify its policy. Indeed, in its brief supporting summary judgment, Center Moriches went so far as to con-

cede that "[i]n the absence of Section 414 of the [New York] Education Law . . . the School District would be obligated to allow access to the facilities for religious groups on the same basis as any other groups may be allowed access." Mem. in Support of Motion for Summary Judgment at 15 (Nov. 15, 1990). But under the Supremacy Clause, U.S. Const. art. VI, cl. 2, a state statute cannot trump petitioners' federal constitutional rights.

In *Widmar*, this Court specifically rejected the argument that a government body may deny equal access in the name of a compelling interest in following a state law mandate for "greater separation of church and state," 454 U.S. at 276. Any such state interest is necessarily "limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against . . . religious speech." *Id.*

4. *The Second Circuit's approval of a "religion-free" designated public forum represents an unconstitutional distortion of public forum doctrine.*

The Second Circuit sidestepped the strict scrutiny test in this case by creating a new species of forum: the "limited public forum from which religious uses would be excluded." 959 F.2d at 387 (Pet. App. 11a). This unprecedented mutation of a designated forum is incompatible with the First Amendment, gravely unworkable, and ultimately circular in its "logic."

a. *Correct application of the concept of "limited public forum" demonstrates the unconstitutionality of the Center Moriches policy.*

It is helpful first of all to recall the proper significance of the term "limited public forum."

A "limited" public forum is simply another label for a "designated" public forum—i.e., a forum which govern-

ment opens for general use for a "limited" category of speakers, media, or subjects. Thus, for example, a university might make its facilities available "limited" only to student groups, *Widmar*, 454 U.S. at 267 n.5, or a municipality might create a facility "limited" to dramatic productions, *e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, or a government body might open an official meeting to public comment "limited" to subjects of official business, *e.g.*, *Madison Joint School Dist.*

In these limited public fora, two different sets of rules apply: on the one hand, exclusion of *eligible* speakers, i.e., those who meet the limiting criteria, must satisfy the constitutional standards for *public* fora, *e.g.*, *Widmar*, 454 U.S. at 267-70 (having opened its facilities to students, university must, "[w]ith respect to persons entitled to be there," justify content-based exclusions under strict scrutiny); on the other hand, exclusions of *ineligible* speakers, i.e., those who do not meet the limiting criteria, need only satisfy the constitutional standards for nonpublic fora, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983) ("limited" public forum is public forum only for "entities of similar character" to those granted access).

In the case at bar, Center Moriches has not questioned Lamb's Chapel's eligibility, *as an entity*, to use school facilities. The Center Moriches policy makes school facilities available to "[o]utside not-for-profit organizations," Rules & Regs. (Pet. App. 56a), with no suggestion of a special exception for churches. A representative of Center Moriches acknowledged that churches may use school facilities, at least for "non-religious" purposes, Tr. 69-71 (testimony of district clerk and business manager Mrs. Alice Schoener), and Center Moriches has in fact permitted church groups to use its facilities for athletics (St. John the Evangelist Church, J.A. 164), for concerts (Hampton Council of Churches, J.A. 93), and

for family counseling ("Family Counseling Services," J.A. 133). Nor can Center Moriches make the implausible claim that the showing of a film on contemporary family issues, open to the public, is not a "social, civic, or recreational use" permitted under state law and its own policy. The sweeping term "social, civic, or recreational" cannot reasonably be construed to exclude such a classic social and civic subject as the family; likewise, the showing of a film on the topic of the family fits easily into the scope of "social, civic, and recreational" uses. Center Moriches, furthermore, has already permitted the use of its facilities for family counseling (J.A. 133), for a strategy meeting on helping needy families (J.A. 123), and for assisting parents to "get in touch with children's feelings" (J.A. 128). Obviously, family issues are fair game for speakers using Center Moriches facilities.

In view of the policy and practice of Center Moriches, then, it cannot be disputed that Lamb's Chapel constitutes an "entity of similar character" that wishes to engage in an activity of the sort permitted in the forum. It follows that the exclusion of Lamb's Chapel must meet the standards governing public fora. *Widmar*, 454 U.S. at 267-68. The content-based exclusion in the present case accordingly triggers—and, as demonstrated above, fails—the strict scrutiny standard. *Id.* at 269-70.

b. *The Second Circuit incorrectly applied the concept of "limited public forum."*

The Second Circuit declined to apply the doctrine of designated public fora in this manner. Instead, the court below interpreted "limited public forum" to be, not a *synonym* for "designated public forum," but instead a

[*] Family Counseling Services is a non-sectarian agency operating under the "umbrella" of the Hampton Council of Churches. Tr. 176 (testimony of Ruth Bragarnick, Director of Development for Family Counseling Services). *See also* Plaintiffs' Ex. 9a (J.A. 93).

special *subcategory* of designated public fora. 959 F.2d at 386 (Pet. App. 10a).

This "subcategory" represents, in the present case, "limited forums not opened to religious uses," *id.* at 388 (Pet. App. 14a).

This novel subcategory embodies the Second Circuit's aberrant approach to the question of religious access to school facilities. According to the Second Circuit, a government body is free to create a "religion-free forum" for private speakers, so long as the government exclusion of religion is *consistent*. Thus, in *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), the Second Circuit held (prior to *Mergens*) that a high school could exclude a student religious club so long as it excluded all *religious* organizations: "since all religious groups are equally denied access to school facilities, any equal protection argument lacks merit." *Brandon*, 635 F.2d at 980 (citation omitted). In *Deeper Life Christian Fellowship, Inc. v. Board of Education*, 852 F.2d 676 (2d Cir. 1988), the Second Circuit held that a church could have a constitutional right to access to school facilities for religious purposes only if the school had engaged in a practice of granting permits "to other *religious* organizations," *id.* at 680 (emphasis added). And in *Travis v. Owego-Apalachin School District*, 927 F.2d 688 (2d Cir. 1991), the Second Circuit held that a school that had permitted previous *religious* uses could not selectively deny access to a new religious speaker, *id.* at 693, unless the school "expressly adopts a new policy that treats all programs with a religious theme equally," *id.* at 694.

In essence, the Second Circuit has created a regime of religious nonreligious apartheid for private speakers. School districts may treat private religious speech as second-class speech, so long as the school districts "discriminate evenhandedly" against *all* religious speech. Thus, in the present case, the Second Circuit sanctioned

the attempt of Center Moriches to create "religion-free limited public fora." To determine if the exclusion of Lamb's Chapel's speech was constitutional, the Second Circuit concluded that it needed only to resolve "[w]hether Center Moriches has opened its facilities to religious uses and purposes," 959 F.2d at 387.

The Second Circuit's approach is inconsistent with precedent, inherently circular, and completely unworkable.

As noted above, there is no separate category of "limited public forum" distinct from "designated public forum." The Second Circuit's innovation represents a departure from the consistent teaching of this Court that there are only three categories of forum: the traditional public forum, the public forum by designation, and the nonpublic forum. *E.g.*, *ISKCON v. Lee*, 112 S. Ct. 2701, 2705-06 (1992); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 572-73 (1987); *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802 (1985); *Perry*, 460 U.S. at 45-46. The creation of a new, fourth category of forum can only serve to confuse and complicate the application of this Court's public forum doctrine.

The Second Circuit's approval of a "religion-free forum" also flies squarely in the face of this Court's *Widmar* decision. In *Widmar*, the university explicitly "limited" the forum—university facilities—by excluding religious uses. 454 U.S. at 265 & n.3. This Court nevertheless held that the facilities in question were a designated public forum open to all student groups. *Id.* at 267.

The rationale of the Second Circuit is also badly circular: *any* content-based exclusion of speech from a designated public forum would be permissible if that same exclusion could serve to redefine the forum and thereby justify the exclusion. Center Moriches asserts that "the State has established a policy of precluding uses for non-permitted purposes." Mem. in Support of Motion for Summary Judgment at 15 (Nov. 15, 1992). But this

is no more than a tautology which contributes nothing to the constitutional analysis.

Finally, the Second Circuit's approach is unworkable to the point of being gravely dangerous to religious freedom.

The Second Circuit has placed itself—as well as district courts and school officials—in the awkward position of screening the content of private speech in search of religous elements. School officials must judge what is and is not religious in order to decide what to forbid. The courts must then second-guess those judgments in order to determine whether the school has been sufficiently "consistent" in censoring out references to God, Christianity, etc. Judges and school administrators will be hard pressed to identify the line the Second Circuit perceived to exist between "[i]ncidental references to religious figures," 959 F.2d at 388 (Pet. App. 13a), and forbidden "religious purposes"; between the "occasional use of religious terms," *id.*, and impermissible religious speech; between "religious overtones," *id.*, and illegal religious content. Indeed, it is highly doubtful whether the Second Circuit's standard of "religious in any meaningful way," *id.* (Pet. App. 14a), supplies a test that is in any way meaningful.

One major consequence of this extremely murky standard, aside from unworkability, is the enormous potential for *de facto* discrimination among religions. Can government officials be expected to apply a uniform scale to measure the "religiosity" of disparate forms of expression?[10] Does such a scale even exist? If not—which seems clear—the Second Circuit's test licenses the sort

[10] When is a song religious? How about a play? How many references to Buddha are permitted? Would the same number apply to Christ? To Zeus? Does it matter whether anyone in the local community subscribes to the relevant faith? What about attacks, either on religion in general or on one faith in particular—are they permitted?

of standardless discretion that creates an unconstitutional risk of discrimination among religious faiths. *See Fowler v. Rhode Island*, 345 U.S. 67 (1953) (invalidating policy restricting religious speech in public park, where officials had *de facto* discretion to discriminate among religions by deciding what was and was not religious); *Widmar*, 454 U.S. at 272 n.11 (determining what speech is "religious" could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion") (internal quotation marks and citation omitted).[11] This mandatory religious review process is no proper business of government officials; indeed, it is a classic example of unconstitutional government entanglement with religion, *see infra* § III.

The proper application of public forum doctrine avoids these constitutional and administrative nightmares. Instead of engaging in content-review and standardless balancing, a court should simply determine whether legitimate, neutral criteria define the forum, and whether the would-be speaker meets those criteria. One's right to equal access to a forum should not depend upon one's willingness to surrender the right to speak in a manner that is "religious in any meaningful way."

The Center Moriches policy clearly fails to meet the standard for content-based exclusions from a designated public forum.

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[11] In the present case, for example, the Second Circuit drew a distinction between religious references in Lamb's Chapel's film about family issues, on the one hand, and a number of other uses that are arguably at least equally religious, on the other. Thus, the court below concluded: that a Salvation Army Band concert, complete with invocation and rendition of "Jericho Revisited" and "God Bless America," Tr. 38, was *not religious*, 959 F.2d at 387; that a Gospel Music Concert, replete with religious songs and hymns, Tr. 50, 52, was *not religious*, 959 F.2d at 387-88; and that a lecture series on parapsychology, Kundalini (a Hindu concept), and "spiritual effusion," Tr. 82-83, 85, was *not religious*, 959 F.2d at 388.

B. The Center Moriches Policy Would Be Unconstitutional Even if the School Facilities were Nonpublic Fora.

Even if the school facilities at issue were deemed nonpublic fora, the school district's policy would fail the governing constitutional test.

The court below effectively held that the school facilities of Center Moriches are nonpublic fora as to Lamb's Chapel. Although the court purported to hold that the facilities were a "limited public forum," the Second Circuit made it clear that, in its view, Center Moriches facilities constitute a "non-public forum" as to activities with religious contents or purposes. 959 F.2d at 386 (Pet. App. 10a). Even if this content-based forum analysis reflected proper constitutional doctrine—which it does not—the *per se* exclusion of religious speech by private persons would still fail the test for exclusions from nonpublic fora.

This Court has explained that "[c]ontrol over access to a nonpublic forum can be based on *subject matter* and *speaker identity* so long as the distinctions drawn are *reasonable* in light of the purpose served by the forum and are *viewpoint-neutral*." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (emphasis added). The exclusion in the present case fails even this deferential standard.

First, the discrimination in this case is not based on either *subject matter* or *speaker identity*. Lamb's Chapel wishes to show a film series on the issues confronting families in the modern age. If this *same* entity (Lamb's Chapel) proposed to address the *same* topic (the family), through the *same* medium (a film series), with the solitary difference that there were no references to a religious perspective, the activity would clearly be unobjectionable to Center Moriches. *See supra* § I(A)(4)(a) (churches permitted to use school facilities); *id.* (family issues are proper subject matter for speech in school

facilities). Center Moriches is not engaging in speaker or subject selection, but in direct, unadulterated, censorship.

Second, the *per se* exclusion of a religious perspective is *viewpoint-discriminatory*.[12] A rule banning religious speech is patently content-based. But as the facts of this case make clear, the selective exclusion of Lamb's Chapel's speech because it presents a religious perspective on an otherwise permissible subject is necessarily viewpoint-discriminatory as well. Lamb's Chapel is free to address the identical topic—the family in the modern world—*so long as it does not do so from a religious viewpoint*. A more flagrant policy of viewpoint exclusion would be difficult to imagine. As this Court explained in *Cornelius*, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." 473 U.S. at 806.

Third, there is simply *no reasonable basis* for the *per se* exclusion of speech by private actors based upon its religious content. Center Moriches claims to rely upon a state statute in defense of its discriminatory policy. In light of the federal Supremacy Clause, however, this statute can provide no rational defense. *Widmar* and *Mergens* render completely untenable any suggestion that speech by private parties, in school facilities available for use by a variety of outside organizations, could somehow trigger a violation of the Establishment Clause. Center Moriches has offered no other colorable rationale for its censorship of private religious speech. Nor did the Second Circuit propose any legitimate basis for the school district's discriminatory policy.

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[12] *Accord May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986) (discrimination against religious speech is restriction on a particular point of view).

Ultimately, Center Moriches is claiming the sheer power to exclude private religious speech for no better reason than just because Center Moriches says so. This assertion of a stark power of anti-religious discrimination is incompatible with the Constitution under any standard. *Accord Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1382 n.14 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990) ("While we have . . . applied strict scrutiny analysis to the facts before us, we are by no means convinced that the reasons advanced by [the school district] for excluding [the religious group] could withstand review even under a rational basis standard"); *May*, 787 F.2d at 1113 (the "contention—that the school discriminates arbitrarily against one type of speech, religious speech—would if true establish an abridgment of free speech however one classifies the [school facilities] along the range of public-private forum").

II. THE CENTER MORICHES POLICY IS AN UNCONSTITUTIONAL CONTENT-BASED CENSORSHIP OF PURE SPEECH.

The preceding section of this brief demonstrates the unconstitutionality of the Center Moriches policy under "forum" analysis. Even apart from the First Amendment forum doctrine, however, the policy in question represents unconstitutional content-based censorship of pure speech.

Strictly speaking, this Court need not engage in forum analysis in order o decide this case. The school district has not denied Lamb's Chapel access *per se*, but has instead sought to *censor out* only the religious *speech* of an otherwise eligible speaker. In such a case, the government has infringed upon pure speech, and resort to forum analysis is unnecessary. *E.g., Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (overturning content-discriminatory prohibition of student expression; no

forum analysis); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (overturning ban on "First Amendment activities" regardless of forum status of airport terminals); *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (overturning content-discriminatory ban on fighting words even where forum is private property and expression constitutes illegal fighting words). *Compare Carey v. Brown*, 447 U.S. 455 (1980), *with Frisby v. Schultz*, 487 U.S. 474 (1988) (content-discriminatory ban on residential picketing unconstitutional even though content-neutral ban on single-residence picketing is permissible).

The Second Circuit held that a public school district may deny outside organizations equal access to the after-school use of its facilities solely on the basis of the religious content or purpose of the planned use. The necessary premise of this holding is the proposition that government may relegate religious speech to second-class status under the First Amendment. This has never been the law.

On the contrary, this Court has consistently upheld protection for religious speech in a wide variety of contexts, with no suggestion that the religious content of that speech in any way limited the full force of First Amendment guarantees. *See, e.g., Lee v. ISKCON*, 112 S. Ct. 2709 (1992) (per curiam) (distribution of religious literature in airport terminals); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (same); *Marsh v. Alabama*, 326 U.S. 501 (1946) (distribution of religious literature in company town); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (religious speech in public park); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (same); *Saia v. New York*, 334 U.S. 558 (1948) (same); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (door-to-door religious canvassing); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (same); *Largent v. Texas*, 318 U.S. 418 (1943) (same); *Schneider v. State*,

308 U.S. 147 (1939) (same); *Jamison v. Texas*, 318 U.S. 413 (1943) (distribution of religious literature in public places); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (same); *Kunz v. New York*, 340 U.S. 290 (1951) (street preaching); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (same).

This is not to say, of course, that a speaker is automatically free from otherwise lawful regulation simply because the speaker communicates religious sentiments.[13] *E.g., ISKCON v. Lee*, 112 S. Ct. 2701 (1992) (upholding ban on solicitation in airport terminals); *Heffron v. ISKCON*, 452 U.S. 640 (1981) (upholding limitation on solicitation at state fairgrounds); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding application of child labor law to distribution of literature).[14]

But at a minimum, the First Amendment precludes any governmental effort to single out and censor—or otherwise burden—the speech of private parties *solely because that speech is religious*. Thus, a city might forbid public assemblies on jailhouse grounds, *Adderley v. Florida*, 385 U.S. 39 (1966), but may not forbid *only* public assemblies for *religious* purposes. An army base might proscribe leafletting, *Greer v. Spock*, 424 U.S. 828 (1976), but not *only* the distribution of *religious* tracts. An airport might ban solicitation in its terminals, *ISKCON v. Lee*, 112 S. Ct. 2701 (1992), but not *only* solicitation for *religious* causes.

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[13] It would likewise be error—though at the opposite extreme—to claim that religious activity has *no* claim to special recognition under the Constitution. So to hold would be to render the Free Exercise Clause wholly superfluous.

[14] In contrast to *private* actors, *government* actors acting in their official capacity do not always enjoy the same freedom to engage in religious speech: "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," *Board of Educ. v. Mergens*, 496 U.S. at 250 (plurality) (emphasis in original).

In short, when a government body makes its facilities available for the expressive activities of private parties, it may not selectively exclude users solely on the basis of the religious content of their speech or activities. *Widmar v. Vincent*, 454 U.S. 263 (1981) (selective exclusion of student religious groups from university facilities violates First Amendment).

In the present case, New York state law explicitly authorizes the use of public school facilities for, *inter alia*, "holding social, civic and recreational meetings and entertainments" which are "open to the general public," N.Y. Educ. Law § 414(1)(c) (Pet. App. 53a). The official rules and regulations of Center Moriches likewise authorize community groups to use school premises for, *inter alia*, "social, civic, or recreational use. . . ." Rules & Regs. #10 (Pet. App. 57a). And in practice, Center Moriches has made its facilities available for a great variety of social, civic, and recreational activities by numerous groups (e.g., the Manorville Humane Society, the Unkechaug Dance Group, the Moriches Bay Civic Association, the Chamber of Commerce, the Southern Harmonizers Gospel Group, etc.). There is no question that Lamb's Chapel, *as an entity*, is eligible to use school facilities for "social, civic and recreational meetings."

Nevertheless, Center Moriches has singled out Lamb's Chapel's planned public showing of a film series for discriminatory exclusion solely because that film presents a religious perspective on contemporary family issues. The school district expressly forbids the use of school facilities for religious purposes, Rules & Regs. # 7 (Pet. App. 57a), and the school district has interpreted this prohibition to bar the showing of a film series *with religious content*.

Such content-based censorship of private religious speech is arguably unconstitutional *per se*. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 512-14 (1991) (Kennedy, J., concurring) (suggesting that First Amendment ban on content-discrimination is absolute).[15] At a minimum, however, such censorship of pure speech is presumptively unconstitutional and subject to strict scrutiny. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2549-50 (1992).

As explained in this brief, *supra* § I(A)(3), the Center Moriches policy of antireligious censorship cannot withstand strict scrutiny review. Accordingly, that policy is unconstitutional.[16]

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[15] "*Any* restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

[16] The clarity of the constitutional rule in this particular context is such that the federal courts of appeals—other than the Second Circuit below—have uniformly recognized and upheld the equal access rights of religious speakers in factual settings indistinguishable from the present case:

—the First Circuit held, in *Grace Bible Fellowship, Inc. v. Maine School Administrative District #5*, 941 F.2d 45 (1st Cir. 1991), that a policy not to lease school facilities to outside groups for activities "for the direct advancement of religion" was unconstitutional;

—the Third Circuit held, in *Gregoire v. Centennial School District*, 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990), that a school policy which forbade use of school facilities by outside groups "for religious services, instruction, and/or religious activities" was unconstitutional; and,

—the Fifth Circuit held that public school facilities which are made available to a variety of outside groups constitute a public forum for free speech, *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978), and that in such public forum property, a policy excluding religious groups is unconstitutional, *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989) (library auditorium).

The Seventh Circuit has strongly suggested, albiet in *dicta*, that it would embrace the same rule. *May v. Evansville-Vanderburgh*

III. THE DISCRIMINATORY EXCLUSION OF PRIVATE RELIGIOUS SPEECH FROM PUBLIC SCHOOL FACILITIES VIOLATES THE ESTABLISHMENT CLAUSE.

The Second Circuit summarily rejected Lamb's Chapel's argument that the selective exclusion of religious speech on the basis of its content violates the Establishment Clause. 959 F.2d at 389 (Pet. App. 15a). This holding conflicts with the relevant decisions of this Court.

First, a policy of equal access for religious speech conveys a message "of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248 (plurality). *Accord Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1380 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990); *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45, 48 (1st Cir. 1991). The Establishment Clause of the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). On the contrary, "[s]tate power is no more to be used to handicap religions, than it is to favor them." *Id.*

School Corp., 787 F.2d 1105, 1113-14 (7th Cir. 1986) (arbitrary exclusion of private religious speech from public school facilities would be unconstitutional). *Cf. Salinas v. School Dist. of Kansas City, Mo.*, 751 F.2d 288, 290 (8th Cir. 1984) (rejecting equal access claim because use permit was withdrawn on strictly procedural grounds and the "school district policy does not deny access to school facilities to religious groups"). *See also Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207 (D. Kan. 1983) (overturning policy banning use of school facilities "for religious worship or other religious purposes").

Petitioners are aware of no federal court outside of the Second Circuit that has reached a contrary conclusion. Nor could a contrary view square with the Constitution.

Second, a policy of equal access for religious speech "would in fact *avoid* entanglement with religion," *Mergens*, 496 U.S. at 248 (plurality) (emphasis in original; citation omitted). Center Moriches would inevitably entangle itself unconstitutionally with religious affairs by the mere enforcement of its policy of religious exclusion. As this Court explained in *Widmar*, an educational institution which excludes private religious speech

> would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

454 U.S. at 272 n.11 (internal quotation marks and citations omitted). *Accord Gregoire*, 907 F.2d at 1381; *Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207, 1218 (D. Kan. 1983).

The ultimate purpose of the Establishment Clause was the safeguarding of religious exercise against the power of the state. The present case presents a classic instance of explicit government oppression of religion. By sustaining this unconstitutional government policy, the Second Circuit disregarded the teachings of *Widmar*, *Mergens*, and other decisions of this Court construing the Establishment Clause.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Second Circuit.

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QUESTIONS PRESENTED

1. Whether the Second Circuit's holding that a school district may limit the use of its facilities to secular purposes is correct in light of the strong public policy considerations inherent in such a designation?

2. Whether the concept of a "limited public forum," in which the standard by which the exclusion of speakers differs according to the speaker and the speaker's purpose, is consistent with this Court's public forum analysis?

3. Whether the policy of New York State and Center Moriches in excluding religious, political and commercial speech is constitutionally reasonable and viewpoint-neutral?

4. Whether the unlimited access policy petitioners seek would give rise to the impermissible inference that government is endorsing and supporting religion in violation of the First Amendment's Establishment Clause?

5. Whether Center Moriches' present selective access policy demonstrates hostility toward religion in violation of the Establishment Clause?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. 91-2024

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of The Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

This case arises from respondent's denial of petitioner's application to use a school auditorium for the purpose of showing a film proselytizing the Christian approach to family values. The decision to exclude petitioner was due to the admittedly religious nature of the film and the School District's prohibition against the use of school property for religious purposes.

Petitioner seeks injunctive and declaratory relief, pursuant to 42 U.S.C. §1983, against the School District for denying them the right to use public school facilities.

A. Statement of Facts

Petitioners in the present case are Lamb's Chapel, an Evangelical Christian Church, and John Steigerwald, pastor of Lamb's Chapel. Respondent's are Center Moriches Union Free School District, Louise Tramontano, in her official capacity as President of the Center Moriches Board of Education, (hereinafter collectively referred to as "Cen Moriches" or "School District") and the New York S Attorney General's office.

Petitioner John Steigerwald, on behalf of Lamb's Chapel, wrote to Mrs. Alice M. Schoener, business manager and district clerk of Center Moriches (Tr. 60), on November 21, 1988, identifying himself as pastor of a growing Christian congregation and stating that "[o]ur paramount objective is to share the love of Christ" (J.A. 70). Enclosed with that letter was an application seeking

permission to use the school facilities for Sunday morning church services and Sunday school (J.A. 73). By letter dated November 23, 1988 (J.A. 78), Mrs. Schoener denied Lamb's Chapel's request citing Rule #7 of the Center Moriches "Rules and Regulations For Community Use of School Facilities." (J.A. 74-77) (hereinafter "Rules and Regs"). Rule #7 mandates that "[t]he school premises shall not be used by any group for religious purposes" (J.A. 75).

Petitioner John Steigerwald twice renewed his application to Center Moriches, each time seeking access to the school's facilities once a week for a period of five weeks (J.A. 80, 91). The purpose of each of these requests was to present a film series entitled "Turn Your Heart Toward Home." By Reverend Steigerwald's admission, this film series stressing family values was "from a Christian perspective" (J.A. 91). Each of these applications were denied by Mrs. Schoener due to the decidedly religious perspective of the film (J.A. 84, 92).

Mrs. Schoener further advised Mr. Steigerwald that the School Board of Education's position was governed by New York State Education Law, section 414 (J.A. 78), which enumerates the ten purposes for which public school property may properly be used. Religious use is not among the ten. N.Y. Educ. Law §414 (1)(a)-(j) (McKinney 1988 and Supp. 1992). However, religious use is not the only exclusion. The statute also proscribes use of public school facilities for partisan political rallies and commercial enterprises.

Pursuant to section 414 and the Center Moriches "Rules and Regs", the school district had permitted a

number of different organizations to use school facilities for various purposes. Petitioners in their brief to this Court have listed the groups that have been granted access as well as the activities and topics that have been discussed (Pet. Br. at 4-6). Nowhere in the petitioners' exhaustive listing is there mention of a religious group who gained access to the school facilities for religious purposes. In fact, the School District has never granted access to any organization that sought to use the facilities for the proselytization of religion.

On the contrary, the Center Moriches public school facilities have been used, consistently with section 414 and the Rules and Regs, only for social, civic, recreational and educational purposes.

SUMMARY OF ARGUMENT

Respondent Center Moriches School District denied petitioners' application to use public school facilities on the grounds that Lamb's Chapel sought access to the school facility to proselytize their religious views. This exclusion was mandated by the Center Moriches Rules and Regs which prohibit use of school facilities for religious purposes. The School District's enactment of the Rules and Regs was governed by New York State Education Law §414(1)(a)-(j) which enumerates the purposes for which public school property may properly be used. Both the statute and the Rules and Regs also prohibit use of public school facilities for political and commercial purposes.

The question thus becomes whether the exclusion of Lamb's Chapel violated any provision of the U.S. Constitution. Respondents argue that it is indeed constitutional to exclude a religious entity from a forum opened for the limited purpose of social, civic, recreational or educational use.

The statute and regulation, in rationally limiting access to public school facilities, are firmly supported by sound public policy. It is eminently reasonable to expect problems to arise if a particular religious or political group is granted access to a public school building. If governmental bodies are not free to open their facilities on a limited basis, i.e. - for a selected class of speakers or for discussion of selected subjects, then these forums may not be opened at all. School Districts, municipalities or States may decide that rather than become embroiled in controversy every time a radical

religious or political organization seeks access to its facilities, that the function of the facility in question may be best served by a closed door policy. Such problems clearly would not be limited to radical religious groups. Given the wide range of existing religious beliefs and that certain beliefs are inherently offensive to others, sometimes violently so, it is sensible to anticipate that a certain group's use of facilities in a particular religious/ethnic community would give rise to a volatile and destructive situation. A policy resulting in closed doors would benefit no one and communities across the nation will suffer as a result. The statute and regulation in issue forestall such results.

A "limited public forum" is created when a government body opens a particular forum for certain uses while excluding others. Such a category of fora comports with this Court's previous public forum analysis, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), and is further supported by a strong public policy argument. This Court has held that "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly or speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense & Ed. Fund.*, 473 U.S. 788, 802 (1985). Regulations excluding a member of a class for whom the forum was opened are judged by the strict scrutiny test applicable to traditional public forums, while exclusion of unspecified users or uses is governed by the non-public forum reasonableness standard.

Based on this "limited public forum" analysis, Lamb's Chapel is not a member of the class for whom this forum was open and is therefore a non-eligible speaker. As such, the exclusion of Lamb's Chapel must be judged on the reasonableness/viewpoint-neutral test and that standard is satisfied here. The exclusionary regulation is reasonable as it furthers the government's interest in maintaining the proper functioning of the facility at issue. Moreover, the regulation is viewpoint-neutral as it prohibits all religious or anti-religious speech on equal grounds.

The unlimited access policy petitioners argue for would violate the First Amendment's prohibition against state establishment of religion. Such a policy would have the primary effect of providing financial aid to religious institutions and it would unnecessarily entangle government with religion. *See, Lemon v. Kurtzman*, 403 U.S. 602 (1971). It may also give rise to the impermissible inference that government is endorsing a particular religious faith.

Moreover, contrary to petitioner's assertions the statute and regulation in issue here do not offend the Establishment Clause. The statute and regulations at issue do not demonstrate hostility toward religion. The petitioners herein remain entirely free to engage in their religious activities and beliefs. They merely are required to use the wide range of facilities, other than the public schools, available to them to do so.

ARGUMENT

It is respectfully submitted that this case requires careful consideration of public policy in light of the various interests that are at stake. Petitioners argue that their rights of free speech are being abridged. However, it must be remembered that the reasonable limitations utilized by respondents are only being applied in a very limited forum and with good reason. This forum has been opened specifically for the Center Moriches School District community's social, civic, recreational and educational enjoyment. A court-ordered unlimited access policy, while benefitting petitioners, may have the adverse effect of stifling the community's ability to enjoy the use of the school facilities for social, etc. purposes. The School District, in response to court-ordered access, may conclude that the burden it will suffer in maintaining a forum open to such diverse use substantially outweighs the benefit inherent in an unlimited open forum; and may decide to close this forum altogether. No person or interest benefits from such a policy.

I. THE EXCLUSION OF A RELIGIOUS ORGANIZATION FROM SCHOOL DISTRICT FACILITIES WAS PROPER IN ALL RESPECTS AS THE FORUM WAS LIMITED TO SECULAR USES AND THE LIMITATION WAS CONSTITUTIONALLY REASONABLE AND VIEWPOINT-NEUTRAL.

In an attempt to establish a workable standard by which to measure when and how the government may regulate speech protected by the First Amendment, this

Court has found it useful to first determine the nature of the government facilities in which private speakers seek to publicize their views. This "forum analysis" approach to First Amendment issues identifies the nature of the government property sought to be used, the interest of the government in that property, and the standard that must be applied in determining whether a particular speaker has been properly excluded from that forum. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)("the extent to which the Government can control access [to a particular forum] depends on the nature of the relevant forum").

Pursuant to this "forum analysis" approach, this Court has traditionally divided government property into three classifications: the traditional public forum, the designated public forum and the non-public forum. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45-46 (1983). The government property in which the public's access is greatest and the government's control is slightest is the traditional public forum: "places which by long tradition or government fiat have been devoted to assembly and debate," *Id.* at 45. Classic examples of such fora are public streets and parks. Government's ability to control expressive activity is most restricted in these traditional open fora, *Id.*, with the standard being one of strict scrutiny. This standard requires the state to demonstrate that an exclusionary regulation is based upon a compelling state interest and that the regulation is narrowly drawn to further that interest. *Id.* Failure to meet this arduous standard results in the government being forced to grant access to the excluded party.

Similar in nature to the traditional public forum is the designated public forum. Government property which has not traditionally been open to public assembly and debate but which the government has opened for use by the public, either for limited or unlimited purposes, falls into this second category. *International Soc'y for Krishna Consciousness v. Lee*, 112 S.Ct. 2701, 2705 (1992). While the state is not required to open such a forum nor keep it open indefinitely, "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry*, 460 U.S. at 46. This Court has found such government facilities as public universities, *Widmar v. Vincent*, 454 U.S. 263 (1981), municipal theaters, *Southeastern Promotion's, Ltd. v. Conrad*, 420 U.S. 546 (1975), and public school board meetings, *Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n.*, 429 U.S. 167 (1976) to be designated public fora.

The third and most restricted category consists of "public property which is not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46. In these non-public fora, the government need only demonstrate that its regulation restricting access is reasonable in light of the facility's intended purposes and is "not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* The government policy need not be the most reasonable nor the only reasonable limitation in order to pass constitutional muster. *Cornelius*, 473 U.S. at 808.

While the three categories discussed above have traditionally encompassed the entire realm of possible public fora, it now appears that a fourth category has

been - and with good reason should be - utilized as part of this Court's forum analysis: "the limited public forum." A limited public forum is defined as a subcategory of designated public forum in which the government has opened a particular property for use by a certain class of speakers or for assembly and debate on selected subjects. *Perry*, 460 U.S. at 46, n. 7 ("[a] public forum may be created for a limited purpose such as use by certain groups, ... or for discussion of certain subjects ...."); *Travis v. Owego-Appalachian School Dist.*, 927 F.2d 688, 692 (2nd Cir., 1991)(a limited public forum "is created when government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects"). Under this "limited public forum" concept, government property remains a non-public forum as to all unspecified uses. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381, 386 (2nd Cir., 1992).

A. The "Limited Public Forum" Is A Legitimate And Beneficial Category Of Fora And Its Use Is Well Supported And Well Advised Both By Public Policy And By This Court's Application Of Public Forum Doctrine.

Petitioners allege in their brief to this Court that the Center Moriches School District facilities are designated public fora, Pet. Br. at 18, and further argue that the "Second Circuit's approval of a 'religion-free' designated public forum represents an unconstitutional distortion of public forum doctrine." Id. at 22. The petitioners are mistaken. The limited public forum simply maintains a distinction already in use by this Court and its use is further supported by a strong public policy argument.

1. Public Policy Strongly Favors The Use Of The "Limited Public Forum" Category.

The Center Moriches School District, as well as the other school districts in New York (and many throughout the nation), has opened its doors for use by the community for "social, civic, and recreational" purposes. It has done so fully aware of the benefit thereby tendered to the district's populace. Moreover, it has done so willingly and voluntarily, eager to return the support of its constituents.

However, the State Legislature has determined that an open access policy would work best by being limited to "social, civic, and, recreational" use. The Legislature has done this neither to inhibit the free exercise of religion nor stifle vigorous political debate. Rather, the legislature has simply provided the district's inhabitants with ample facilities in which to gather for nonprofit, apolitical and secular meetings and entertainment.

As this Court has recognized in the past, the School District was not required to open its facilities in this way, nor are they required to keep them open indefinitely. *Perry*, 460 U.S. at 46; *Cornelius*, 473 U.S. at 802. With this in mind, respondents respectfully urge this Court to consider the consequences of a decision in petitioner's favor. The Center Moriches School District (as well as every other school district in New York and the Nation that had provided access to their facilities to any portion of the community) would now be required to open their doors to all speech, regardless of purpose and intent. This would necessarily require the granting

of applications to the Neo-Nazi party and the Ku Klux Klan. Partisan political rallies and flea markets (as applications from commercial groups would similarly have to be granted) would become commonplace in the public schools of this Country.

Petitioners would necessarily argue that this is precisely what is required and protected by the First Amendment; for there is no logical basis to argue that religious speech should be allowed while political speech may be excluded. Thus, we have a situation where if the school districts of this Country desire to open their facilities for use by the community then they must open their doors to all speech.

Given the wide range of existing religious beliefs and that certain beliefs are inherently offensive to others, sometimes violently so, it is sensible to anticipate that certain groups' use of facilities in a particular religious/ethnic community would give rise to a volatile and destructive situation.

Imagine the problems associated with a request from a militant Muslim organization in a predominantly Jewish neighborhood. Demonstrations, perhaps violent demonstrations, may become commonplace and would not necessarily be confined to non-school hours. Such occurrences may have the disastrous effects of destroying school property, disrupting classes when in session and subjecting the students to potentially violent demonstrations.

Given these possibilities, respondents believe that an unlimited access policy is not required of the First

Amendment. In fact, a decision in petitioners favor may have the effect of stifling speech rather than protecting and encouraging it. The Center Moriches School District may well decide (and any or all of the other state school district may follow suit) to close their doors to all and confine the use of the school facilities to its intended educational purpose. The School District (or the New York Legislature for that matter) may decide that rather than become embroiled in controversy every time a religious sect or radical political organization seeks access to its facilities and rather than expose the district's youths to potentially harmful demonstrations, a better course may be to adopt a closed door policy and leave the community to provide for their "social, civic, and recreational" enjoyment on their own. No one benefits from such a policy, and the ability of the community to gather for assembly and discussion may be severely curtailed.

2. The "Limited Public Forum" Category Is Presently Used By This Court As Part Of Its Public Forum Analysis.

Public policy notwithstanding, the distinction inherent in the "limited public forum" category is already an integral part of public forum analysis. This Court has, on numerous occasions, spoken of a particular type of designated public fora in which a government facility has been opened for use by a selective class of speakers or for speech on designated subjects.

In *Perry*, *supra*, for example, it was held that a school's internal mail system was a non-public forum open for use to only a limited number of outside entities. *Id.* at 47. This Court, in so holding, stated:

> [t]here is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. *This type of selective access does not transform government property into a public forum.*

Id. (emphasis added).

Similarly, in *U.S. v. Kokinda*, 110 S.Ct. 3115 (1990), this Court held that a sidewalk on postal service property was a non-public forum even though some expressive activity had been permitted there. The Court, citing *Perry* and *Cornelius*, *supra*, stated:

> [w]e have held that '[t[he government does not create a public forum by . . . *permitting* limited discourse, but only by intentionally opening a non-traditional forum for public discourse.'
>
> . . . .
>
> Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely non-public forum, under

> *Perry*, regulation of the reserved non-public uses would still require application of the reasonableness test.

Kokina, 110 S.Ct. at 3121; *see also*, *Cornelius*, 473 U.S. 788, 805 (Combined Federal Campaign is a non-public forum providing limited access only to "those organizations considered appropriate"); *Widmar*, 454 U.S. 263 (university facilities available limited only to student groups); *Southeastern Promotions*, 420 U.S. 546 (municipal facilities limited to dramatic productions).

In the cases cited above, this Court found the facilities at issue to be non-public fora with respect to all groups or organizations dissimilar in purpose to those meeting the limiting criteria. As to organizations of a character or purpose similar to the permitted groups, those facilities were designated public fora.

Respondents are asking this Court in the present case to maintain this distinction. The School District believes, as the Second Circuit has held, that it would be advisable for this Court to now categorize this distinction by designating such fora as "limited public fora," rather than "designated public fora" for entities of a similar nature and "non-public fora" as to organizations different in character. The respondent School District believes such an approach would aid this Court in clarifying what some believe is confusion regarding public forum analysis. *See* ACLU brief at 18-21 ("[i]n our view, the conceptual framework of *Perry* suffers from a central inconsistency that the facts of this case have clearly exposed"). Moreover, there is a strong public policy argument (*see*, *supra*, Section I.A.1.) in favor of

maintaining (or creating) this fourth category of public fora.

B. Constitutional Standard of Review

However, whether the limited public fora categorization respondent advances or the current designated public fora/non-public fora distinction is maintained, the standard by which excluded speech or speakers is judged is still the same. The exclusion of eligible speakers (i.e - those with a purpose or character similar in nature to those traditionally granted access to a particular forum) from a given government facility would still be judged by the "traditional public forum" strict scrutiny test. Conversely, the reasonableness/viewpoint-neutral test would be applied to the exclusion of non-eligible speakers (i.e. - those with a mission dissimilar to a facility's specified uses).

Thus, in the *Widmar* case, *supra*, it was found that the University of Missouri at Kansas City (UMKC) had granted access to their facilities and had officially recognized over 100 different student groups and in fact encouraged the activities of student organizations. This Court applied the "traditional public forum" strict scrutiny test in determining that the exclusion of an eligible speaker - a student religious group - was unconstitutional. The Court, in so holding, stated that the UMKC had "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion." *Widmar*, 454 U.S. at 269. The forum at issue in *Widmar* was the University campus and was a "generally open forum" only with respect to organizations

of similar character. If, however, it was a church organization unaffiliated with the UMKC that had sought access, the standard applied to the University regulation restricting access would have been one of reasonableness. *Id*. at 267-68, n. 5.

The respondent School District respectfully submits - as petitioners and *amici* have argued - that the *Widmar* decision is indeed controlling here, albeit with a different result. As the following analysis will clearly demonstrate, Lamb's Chapel is not an eligible speaker, as the student group was in *Widmar*, and the School District regulation excluding Lamb's Chapel was reasonable and viewpoint-neutral. As such, the Second Circuit's decision holding the exclusion of Lamb's Chapel to be necessary and proper was eminently correct and should be affirmed by this Court.

C. The Center Moriches School District Facilities Are Limited Public Fora.

Respondent's argument here is based upon the premise - and petitioners do not dispute this point - that public school facilities are not traditional public fora. *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 679 (2nd Cir., 1988); *Trietley v. Board of Educ.*, 65 A.D. 1, 8, 409 N.Y.S.2d 912, 917 (4th Dep't., 1978). Rather, school district facilities are non-public fora that may, at the school district's discretion, and in accordance with New York Education Law section 414, be opened for limited public discourse. If and when they are so opened, they become designated public fora. This, however, holds true only for those entities that are similar in character and purpose to other entities that

have been permitted to use the facilities. As to organizations with a purpose traditionally precluded from using a given facility, the property remains non-public.

The distinction between permitted and non-permitted uses is a function of the legislative interest in opening the forum in the first place. *See*, *Deeper Life*, *supra* ("'[c]ritical to a finding that [the state] has created a limited public forum,' . . . is a determination of the State's intent in establishing the forum"). In the present case, as the following analysis will demonstrate, the New York Legislature enumerated the purposes for which public school property may be used; and religious use was not among the enumerated purposes. *See*, N.Y. Educ. Law §414(1)(a)-(j).

The Court of Appeals for the Second Circuit analyzed the questions presented in the present controversy and found that:

> [a]n examination of the pertinent policy and actual practices however, convinces us that the school property in question falls within the subcategory of 'limited public forum,' the classification that allows it to remain non-public except as to specified uses.

Lambs Chapel, 959 F.2d at 386.

The Second Circuit then proceeded to examine the policy and practice of the Center Moriches School District and correctly determined that:

> . . . none of the prior uses pointed to by the [petitioners] were for religious purposes. Nor are we able to discern any previous uses of any school district property for religious purposes upon an examination of the record.
>
> ...
>
> We therefore conclude that the facilities were limited forums [sic] not opened to religious uses by policy or practice and that there was no constitutional violation in the failure of the School District to afford access to [petitioners].

Lamb's Chapel, 959 F.2d at 388.

Obviously, the distinction between eligible speakers and non-eligible speakers is an important one and petitioner's contention that "Center Moriches has not questioned Lamb's Chapel's eligibility, *as an entity*, to use school facilities," Pet. Br. at 23 (emphasis in original) is misleading. Center Moriches has repeatedly asserted that Lamb's Chapel, as a religious entity with a religious purpose, is not an eligible speaker for limited public fora purposes. *See*, *e.g.* J.A. 78, 84. They are not at all similar in purpose to any entity that has previously been granted access to the school facilities, nor is religious use consistent with New York policy regulating the use of public school property.

1. New York State And Center Moriches District Policy Supports The Conclusion That The School Facilities Are Limited Public Fora.

New York Education Law section 414 is the enabling statute that enumerates the purposes for which New York State school district property may be used. Specifically, New York public school facilities may be used, subject to the regulation and discretion of each school district's trustees or board of education, for ten (10) distinct purposes:

1 - education, learning or the arts,
2 - public library purposes,
3 - social, civic and recreational meetings and entertainment,
4 - for meetings and entertainment where admission is charged and the proceeds applied to an educational or charitable purpose, but not for the benefit of a religious sect or denomination,
5 - for polling places for primaries and elections or for political meetings and registration of voters,
6 - civic forums and community centers,
7 - for classes of instruction for mentally retarded minors,
8 - for recreation, physical training and athletics, and
9 - for child care services during non-school hours.
10- for graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

N.Y. Education Law section 414(1)(a)-(j) (Pet. App. 53a).

Petitioners focus on subsection three and argue that it "would be difficult to imagine a more expansive use policy than one explicitly open to any 'social, civic, or recreational use.'" Pet. Br. at 19. In essence, petitioners believe that N.Y. Educ. Law section 414 encompasses the universe of constitutionally protected free speech. However, this is clearly not the case. The plain language of section 414 indicates that it was not the N.Y. Legislature's intent to permit any and all speech regardless of its message, purpose or benefit.

The Legislature obviously envisioned the benefits that individual school district communities would enjoy if school district property were open for their use; but also determined that certain classes of speech or speakers might be destructive of those ends or of the principal function and purpose of the school property, namely, the education of the State's youth. The Legislature determined that it would be inappropriate to permit religious organizations to use public school facilities for religious purposes. However, contrary to petitioner's apparent belief, this was not the only exclusion. Use of school grounds for commercial enterprises, partisan political rallies or gatherings of fraternal organizations are similarly prohibited. Petitioners appear to minimize these exclusions, but they are no less important than the religious use exclusion contained in section 414. The exclusion of certain classes of speech or speakers indicates the legislature's intent to create a "limited public forum" rather than a "generally open" designated public forum.

2. Past Practice Of The Center Moriches School District Similarly Supports The Conclusion That The School Facilities Are Limited Pubic Fora.

Petitioner argue that "[i]t has been the consistent practice of the Center Moriches School District to allow a wide diversity of outside groups to use its facilities." Pet. Br. at 19. This is true. Center Moriches, pursuant to New York State policy, has permitted many groups to use its facilities for social, civic, and recreational purposes. As to groups similar in nature to those previously granted access, Center Moriches is indeed a "designated public forum" where the applicable standard of review would be strict scrutiny.

However, School District policy does not permit school facilities to be used for religious purposes and petitioner's have apparently abandoned their argument (made to the lower courts) that certain events in the past indicated religious use. Thus, the School District facilities remain non-public with respect to religious (or partisan political or commercial organizations) entities with a religious purpose. Respondents respectfully submit that the standard by which the exclusion of petitioners should therefore be judged is that applicable to non-public fora, namely, that the limitation be reasonable and viewpoint-neutral. Such is clearly the case in the present controversy.

D. As Center Moriches School District Is A "Limited Public Forum," The Exclusion Of Lamb's Chapel, A Non-Eligible Speaker, Need Only Be Reasonable And Viewpoint-Neutral To Pass Constitutional Muster.

As a religious entity with a religious purpose seeking access to a government facility that excludes such speakers, Lamb's Chapel is not an eligible speaker for purposes of forum analysis. The Center Moriches School District facilities are limited public fora and, as such, the government regulation excluding a non-eligible speaker must be judged by the reasonable/viewpoint-neutral test. However, as stated by this Court in *Cornelius*, *supra*, the government limitation need not be the most reasonable nor the only reasonable limitation in order to pass Constitutional muster.

In the case at bar, the New York State policy as interpreted and applied by Center Moriches, precluding the use of public school facilities for religious purposes is indeed reasonable and viewpoint-neutral.

1. Reasonableness

As stated previously, the primary function of the government facility at issue here is the education of the School District's youth. Moreover, the primary purpose of the District's open access policy is to provide a setting for the District's inhabitants to pursue "social, civic and recreational" enjoyment. The New York Legislature and the School District Board of Education have determined that permitting religious (political or commercial) use may interfere with either the function of the school or

the purpose of the forum, or both. While petitioners may argue that on the specific facts of this case these possibilities are minimal, respondent's submit that this Court must look beyond the specific facts to the consequence of a court-ordered open forum. If the Court does so extrapolate, it becomes obvious that such an "open forum" policy will indeed interfere with the function and purpose of the school and the forum.

Unrestricted access would force Center Moriches to open its doors to any and all religious and political speech. It is eminently reasonable to expect problems arising when religious or political organizations gain access to public school facilities. Demonstrations against their views and beliefs may conceivably end in the destruction of school property or the disruption of classes during the week. Any of the above circumstances or a host of other very real consequences will hinder the proper and primary function of the property at issue - education.

The State's and School District's fear of such possibilities (or, more likely, probabilities) makes the restriction on religious use reasonable. Their interest in maintaining the integrity of the State's public school property is obviously of paramount importance and their determination of how best to protect that interest must be accorded the same deference given to any well-conceived and well-intentioned legislative policy. In addition, as the foregoing analysis clearly established, the regulation restricting access is not violative of any provision of the United States Constitution.

2. Viewpoint-neutral

The government restriction at issue in the case at bar does not discriminate based on the viewpoint of the excluded speaker. Rather, the regulation excludes speech on the basis of the speaker's identity and the subject matter of their speech. This Court has held that such restrictions are constitutionally permissible when applied to a private person seeking access to a non-public or limited public forum. *Cornelius*, 473 U.S. at 806 ("[c]ontrol over access to a non-public forum *can be based on subject matter and speaker identity* so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral") (emphasis added).

Petitioners take great pains to support their assertion that "[a] more flagrant policy of viewpoint - exclusion would be difficult to imagine." Pet. Br. at 30. However, petitioner's argument is undermined by the very case they cite as support - *Cornelius*. In *Cornelius*, the Court stated that:

> [a]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created, . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he expresses on an otherwise includible subject.

Cornelius, 473 U.S. at 806 (internal citations omitted).

The facts of the present case fit very neatly within the above quotation. The Center Moriches School District is a non-public forum with respect to religious use; the proselytization of religion is not an enumerated purpose of the forum and Lamb's Chapel was not excluded from the forum due to its particular viewpoint on an otherwise includible subject. Rather, exclusion was mandated by the religious purpose behind Lamb's Chapel's proposed use of the facility. This is no more viewpoint - discriminatory than excluding the Communist party from holding a political rally would be. In each case, the exclusion would be a function of the nature of the forum and the proposed use of the facility.

Certain uses were not enumerated as permissible by the New York Legislature nor are they proper for the forum at issue. To say that Center Moriches is engaged in "direct, unadulterated, censorship," Pet. Br. at 30, is to denigrate the conclusions of New York's lawmaking body and to disparage the intentions of the Center Moriches School District's Board of Education.

II. A COURT ORDERED POLICY OF UNLIMITED ACCESS WILL VIOLATE THE FIRST AMENDMENT'S PROHIBITION AGAINST GOVERNMENT ESTABLISHMENT OF RELIGION.

The First Amendment to the U.S. Constitution mandates, *inter alia*, that "Congress shall make no law respecting an establishment of religion." In interpreting this clause, this Court has identified "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)). The Court has developed a three-pronged test by which to determine when a state or federal policy violates one or all of the above "evils." *Lemon*, *supra*, 403 U.S. at 612:

> First, the statute must have a secular legislative purpose, second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster 'an excessive government entanglement with religion.'

Id. at 612-13 (internal citations omitted).

In the case at bar, the unlimited access policy that petitioner asks this Court to order would violate two of the above tests. Such a policy would have the primary effect of advancing religion and it would entangle the government unnecessarily in religious affairs. Moreover,

it is probable that such a policy would result in the appearance of government imprimatur of religion.

A. Access To Public School Facilities By Religious Organizations May Result In The Appearance Of Government Imprimatur Of Religion.

School districts in New York State may be comprised mainly of people of one particular religious faith or denomination. As such, only one religious sect may seek access to a particular school district's facilities. For example, no religious organization beside Lamb's Chapel has ever requested the use of Center Moriches school facilities for the purpose of holding services.

If the petitioners are granted the relief they seek, they may be the only religious denomination holding services in the public schools. The people of the School District and, more importantly, the children of the District will begin to identify Lamb's Chapel with the public school. This will eventually give rise to the impermissible inference that Center Moriches is sponsoring, supporting and endorsing Lamb's Chapel and their religious beliefs.

Petitioners will undoubtedly argue that they are not seeking to hold services in the school facility. However, it must be remembered that the petitioners first application to the Center Moriches school board was for the sole purpose of holding Sunday services and Sunday school (J.A. 73). Even if the request is limited to the specific circumstances of this case, it is still repugnant to the Constitution; for as this Court stated in *Lemon*:

> [a] law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the [establishment] clause. A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

Lemon, 403 U.S. at 612 (emphasis in original).

Thus, if this Court were to permit Lamb's Chapel to use the school facilities to show their film series, it would represent a first, but significant, step towards the establishment of religion.

Finally, for government to avoid the appearance of endorsing one religion over another, it would need to monitor how often the people of a particular faith used the school buildings. This constant supervision would require "excessive government entanglement with religion," in violation of this Court's interpretation of the Establishment Clause. *Lemon*, 403 U.S. at 612-13.

B. The Primary Effect Of A Court-Ordered Unlimited Access Policy Would Be Government Advancement And Financial Support Of Religion.

As it stands, the policy of the State of New York is to permit school districts to open their facilities to community use for social, civic, recreational and educational purposes. A court-ordered policy forcing school districts that have opened its doors to now permit

all speech regardless of purpose would have the primary effect of benefitting religion. Religious organizations would now be permitted to use government facilities to conduct services and hold Sunday school. *See*, Petitioner's Application, J.A. at 73. This would necessarily mean that petitioners (or other religious organizations) would benefit from state financial support in the form of rent-free facilities, heat, lighting and other connected expenses. *See*, *Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dep't., 1978).

Such financial support amounts to more than just "incidental" benefits as these religious organizations would, in effect, be establishing their chapels in a public school auditorium. *See*, *Widmar*, *supra*. This is not the same type of incidental benefit a sectarian college receives when financial aid is given to assist the college in constructing or renovating its buildings and grounds. *See*, *Hunt v. McNair*, 413 U.S. 734, 742-45 (1973). Services would be held, children would attend Sunday school and the church's congregation would gather at assorted times to celebrate their faith. In addition to directly benefitting religious organizations, as stated previously, the principal effect of such a policy would be government advancement of religion. This, of course, is incompatible with the establishment clause of the First Amendment.

III. CENTER MORICHES' EXCLUSION OF RELIGIOUS SPEECH FROM PUBLIC SCHOOL FACILITIES DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Petitioner's final argument to this Court is that Center Moriches' present policy of excluding religious speech violates the Establishment Clause of the First Amendment. This argument is unpersuasive and was summarily rejected by the Second Circuit.

First, the exclusionary policy at issue here does not demonstrate hostility toward religion as petitioners suggest. Rather, it evidences the New York Legislature's and Center Moriches' desire to create a forum for social community use without the appearance of government endorsement of religion. Center Moriches has no desire to stifle or censor petitioner's right to practice and worship as they see fit. Lamb's Chapel is free to pursue their religious beliefs and hold service in any of the traditional public fora (i.e. - streets and parks) or in any facility that is available for purchase or lease. Center Moriches only asks that Lamb's Chapel not enlist the aid of the public school system to do so. *See*, *Trietley*, 65 A.D.2d at 8, 409 N.Y.S.2d at 917.

Secondly, petitioners are mistaken in their belief that the present policy will entangle government with religion. Center Moriches has never had a problem in determining when a party seeks the use of school facilities for religious purposes. In fact, the standard is a very simple one in which access is denied to any party that seeks to proselytize their religious beliefs.

Petitioner's contention that the standard vests too much discretion in the school board, exaggerates the difficulty an official would have in determining the purpose behind a particular request for access. The Center Moriches "Application for Use of School District Facilities" includes sections where applicants must enumerate the activity they seek to engage in and the purpose behind the activity. *See, e.g.* J.A. 80.

Unless the school board was to begin with the assumption that applicants are lying, there is obviously no problem in determining the purpose behind a particular request and the acceptability of that purpose.

Thus, the policy at issue is not at all hostile to religion nor does it entangle the government in religious affairs. It simply opens a public school facility for "recreational" use by the community without entangling the school district in controversy over when, how and who may use the facilities for religious or political purposes. This is altogether proper and in full accord with the dictates of the United States Constitution.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Second Circuit.

Respectfully submitted,

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No. 91-2024

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

—against—

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO in her official capacity as President of the Borad of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT ATTORNEY GENERAL

STATEMENT OF THE CASE

New York has never opened its schools to indiscriminate use by the public at large when school is not in session. Instead, it has provided each of the more than 700 school districts in the state with limited discretion to determine whether to allow their local schools to be used for any of the particular purposes set forth in Education Law § 414.

The statutory list of uses which a school district may permit does not include religious use. The Court of Appeals for the Second Circuit held in this case that petitioners' First Amendment rights were not violated by the absence of authority for

their use of a local school for concededly religious purposes. In reaching that conclusion, the Second Circuit was faithful to the First Amendment and to this Court's precedents, and its judgment upholding the statute should be affirmed.

A. Education Law § 414

Since at least the middle of the last century, New York has scrupulously reserved its public schools for only particular non-school uses. Those uses are set forth in New York Education Law § 414 (52a).[1] New York intended, by allowing certain non-school uses of its school buildings, to provide a benefit only to the local community and to do so without sacrificing the schools' identities as such, even during the hours when students are not being taught within their walls. The legislative history of the statute, and its interpretation and implementation by the state commissioner of education, demonstrate the strict limitation imposed on the discretion of local school boards in considering applications for non-school uses.

1. History of the statute

The first reference in New York codes to the extra-curricular use of public schools was enacted in 1864, when the state legislature passed an act to "revise and consolidate" the general laws relating to public instruction. Laws of 1864, chapter 555. That act provided that the trustees of a school district

> may freely permit the school house, when not in use for the district school, to be used by persons assembling therein for the purpose of giving and receiving instruction in any branch of education or learning, or in the science or practice of music.

Id., title VII, § 52.[2]

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1 References to pages of the appendix to the petition appear herein as "—a".

2 That provision was codified in 1909 as Education Law § 114, Laws of 1909, chapter 21, and entitled "Use of School-house out of school hours". *Id.* It was recodified as section 455 in 1910. Laws of 1910, chapter 140.

By 1913 the question of non-school use of school buildings had become a nationwide issue. *See, e.g.*, J.H. Bush, *Use of School Buildings for Other Than School Purposes*, 20 CASE AND COMMENT 255 (1913) (collecting cases); Note, *Use of Public School Property for Other than School Purposes*, 50 L.R.A. (N.S.) 1182 (1914). *See also Fact and Comment*, 80 THE SCHOOL JOURNAL 153 (March 1913) (reporting that Colorado voters had disapproved a measure providing for wider use and control of school buildings by the people, and also reporting on the efforts of Logansport, Indiana, to make its new schoolhouse a "social center"). "Probably the most frequent use for which school buildings were demanded was for religious meetings", Bush, *supra*, 20 CASE AND COMMENT at 256, and the cases which considered the right to such use—which the author found to be "surprisingly few in number"—were in conflict. *Id. See also id.* at 256-57 (collecting cases).

The issue of extending the use of its school buildings arose in New York as well. *Ninth Annual Report of the Education Department* ["*1913 Report*"] at 41 (February 3, 1913). In its report to the Legislature, the Education Department pointed approvingly to the contemporary Wisconsin law, which provided in substance that school buildings could be used for the "presentation and discussion of public questions" when they were not needed for school purposes, and that those buildings could "also be used for such other civic, social and recreational activities as do not interfere with their proper use". *Id.*[3]

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3 The Wisconsin law to which the 1913 Report referred was apparently Chapter 27, § 435d(1) of the Wisconsin Statutes (1911), entitled "Nonpartisan gatherings of citizens", which provided:

> Upon application of not less than one-half of the voters residing in the district, the school board or other body having charge of schoolhouses or other public buildings or grounds, which are capable of being more widely used as public meeting places for nonpartisan gatherings of citizens, for the presentation and discussion of public questions or for other civic, social or recreational activities, shall allow the use of such buildings or grounds for the open presentation and free discussion of public questions, and may allow the use of such buildings or grounds for such other civic, social and recreational activities as in the opinion of the

Shortly after the Education Department made its 1913 annual report, the New York Legislature passed "An act to amend the education law, relative to the powers of voters of school districts, and extending the use of school buildings" as part of a package of education-reform bills. Laws of 1913, chapter 221.[4] *See Current Topics*, 39 THE SCHOOL BULLETIN 419-20 (June 1913). Among other changes, the act replaced Education Law § 455 with a new text allowing more extensive use of school buildings after school hours and spelling out the five categories of permissible uses. The new section 455, which was later renumbered as section 414, Laws of 1947, chapter 820, contained provisions substantially identical to certain of those found in paragraphs (1)(a) through (1)(e) of current Education Law § 414(1), the statute at issue in this case.

2. Administrative interpretation

New York law gives the state commissioner of education authority to decide administrative appeals regarding the application of Education Law § 414. *See* Education Law § 310.[5] The commissioner's decisions reaffirm that the State's purpose in allowing extra-curricular use of its school buildings was to enhance the community service of the school buildings, not simply to provide public meeting halls. As the commissioner wrote in 1926:

> Schools are established and maintained for a definite and specific purpose, to wit, the secular education of the youth

controlling board do not interfere with the prime purpose of the building or grounds.

Wisconsin has since that time replaced that statute with one that provides, in part, that "[n]othing in this section prohibits the board from granting the use of school property to religious organizations [for temporary use]". Wisconsin Statutes Annotated 119.70(5) (1991 & Supp. 1992).

4 The direct legislative history for New York laws of that period is only rarely available. *See* E.M. Gibson, *New York Legal Research Guide* 104-05, 110 (1988). The direct history of the statute at issue here is not among those available.

5 Petitioners here did not pursue the administrative remedy available to them under the Education Law.

> of the State, and any activity within the scope of that purpose or tending to promote the welfare of the schools and the community should be allowed and encouraged.

Appeal of American Civil Liberties Union, 36 State Dep't Rep. 87, 97 (Educ. Dep't 1926).[6] "The Legislature never intended to throw the school buildings wide open as public forums where organizations and societies of every kind can assemble and discuss subjects of every nature." *Id.* at 98.

That view was echoed by the commissioner nearly 60 years later in dismissing an appeal from the denial of permission to distribute religious literature on school grounds:

> Implicit in [the applicant]'s argument is a misperception that the schools are a public forum open to all members of the community. Schools are not public places in the sense that their use may be demanded as a matter of right by an individual.

Appeal of Rathjen, 22 Educ. Dep't Rep. 595, 598 (1983) (citation omitted). In *Appeal of Ellis*, 77 State Dep't Rep. 32, 34 (Educ. Dep't 1956), the commissioner held that

> School buildings are erected for one purpose only, to provide a place in which the school district can instruct the pupils of the district. It is not a public building in any other sense. . . . No one other than teachers and pupils is entitled to access to the building generally. Even parents can be prevented from wandering about at will.

The school's auditorium, gymnasium and cafeteria, the type of large space presumably at issue here, were considered "classrooms exactly the same as any other place in the school used for assembly and instruction of pupils." *Id.*

Within the authority granted by section 414, local school districts have discretion to determine how their schools may be

6 From 1913 to April 1, 1958, judicial decisions of the Commissioner of Education were reported, together with those of other New York State agencies, in State Department Reports. Since April 1, 1958, they have been reported in Education Department Reports. *See Foreword*, 1 Educ. Dep't Rep. iv, vii-viii (1962).

used. *See Formal Opinion of Counsel No. 227*, 8 Educ. Dep't Rep. 225 (Educ. Dep't 1968). As the commissioner noted in dictum in *Appeal of Scanio*, 22 Educ. Dep't Rep. 315, 317 (1982), the discretion of local school boards is "not unlimited", even as to uses by such a closely school-related organization as the PTA. Accordingly, the commissioner has repeatedly prohibited school districts from allowing their schools to be used for purposes not explicitly provided by the statute.

In one of the earliest reported administrative decisions under the statute, *Appeal of Kennedy*, 2 State Dep't Rep. 625 (Educ. Dep't 1914), the commissioner sustained an appeal by a district resident complaining that a local trustee had permitted a "religious sect or denomination" to use the school house on certain evenings and on Sundays. The commissioner held that section 414

> specifies the purposes for which a school house and the rooms therein may be used outside of school hours. The use thereof is not permissible for any other purpose than those specified. The use for meetings conducted by a religious sect or denomination is not included within the uses expressly authorized by the statute, and such a use is therefore unlawful.

Id. at 625. *See also Rathjen*, 22 Educ. Dep't Rep. at 598, finding that "[r]eligious purposes are not among those enumerated in Education Law § 414".

Other examples of proposed uses which were held to fall outside the authorization of section 414 are the "use of a school facility for a private commercial venture", *Appeal of Board of Educ. of City School Dist. of City of Buffalo*, 21 Educ. Dep't Rep. 585, 588 (1982); meetings of labor union locals, *Appeal of Brett*, 5 Educ. Dep't Rep. 54 (1965); and even school-related uses, such as the storage of school buses on school grounds. *Appeal of Weiss*, 19 Educ. Dep't Rep. 308 (1979). Rental of school property was formerly held to be unauthorized, *Appeal of Steflovich*, 7 Educ. Dep't Rep. 76 (1967), but in 1976 the Legislature added limited authority to rent public schools for

the purposes set out in certain paragraphs of subsection 414(1). *See* Education Law § 414(2).

A community may not override the statutory limitations on its use of public schools other than as provided in the statute itself. *Appeal from Action of the Trustees of District No. 1, Town of Mohawk*, 31 State Dep't Rep. 447 (Educ. Dep't 1924) (public dances for individual's financial benefit); *Appeal in Relation to Use of School Building in U.F.S.D. No. 3, Town of Clarkstown*, 41 State Dep't Rep. 423 (Educ. Dep't 1931) (political meetings or rallies). Nor can a use expressly precluded by one provision of the statute be permitted under another. In *Appeal of Gaskin*, 1 Educ. Dep't Rep. 673 (1961), the commissioner found improper a political meeting held in a school building, despite the local board's belief that the meeting was "civic" within the meaning of subdivision 3 of section 414 [now paragraph (1)(c)], because subdivision 5 [now paragraph (1)(e)] expressly precluded the use.

By contrast, where the commissioner has upheld proposed uses, they have emphasized the statute's intention to serve the community rather than provide a forum for debate. *See, e.g., Appeal of Alcorn*, 24 Educ. Dep't Rep. 201, 204 (1984) (school facilities could be used for training session concerned with safety at a nearby nuclear plant because that use "pertained to the welfare of the community as a whole"); *Appeal of Erdberg*, 26 Educ. Dep't Rep. 464 (1987) ("flea market" held on school grounds for the purpose of raising funds for educational programs, not otherwise available to the students, "clearly pertain[ed] to the welfare of the community served by" the school and was permissible).

B. Proceedings Below

Petitioners brought this action for declaratory and injunctive relief against respondents school district and the president of its board of education (the "local school district") because the local school district refused to allow petitioners to use local school facilities during non-school hours for the purpose of showing a film series. *Lamb's Chapel v. Center Moriches*

Union Free School Dist., 770 F. Supp. 91 (E.D.N.Y. 1991) (16a). Petitioners conceded that the film series was of a religious nature and that its showing was for a religious purpose. *Id.* at 92 (18a).

On cross-motions for summary judgment, the district court found the facts to be undisputed, 770 F. Supp. at 92 (17a), and granted judgment to the local school district. The district court found that the local school district had not, by its policy or practice, "opened its doors to groups akin to Lamb's Chapel", *id.* at 99 (31a-32a), and held that the school district's denial of petitioners' applications was viewpoint-neutral and, hence, constitutional.

On appeal to the Second Circuit, petitioners asserted a challenge to the constitutionality of Education Law § 414 insofar as it failed to authorize their desired use of a public school. The New York Attorney General sought, and was granted, permission to intervene in defense of that challenge pursuant to 28 U.S.C. § 2403(b).

Applying the principles established by this Court, primarily in *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985), and *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983), the court of appeals determined that New York had created a limited public forum, devoting its public schools only to the uses specified in Education Law § 414. This case, the court of appeals wrote, "presented [an] outside organization[ ] seeking access where access has been limited and all religious use has been barred by policy and practice". *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381, 389 (2d Cir. 1992) (15a). Accordingly, the court held that "there is no basis for any claim of First Amendment violation here" (*id.*), and affirmed in all respects.

This Court granted certiorari on October 5, 1992. 113 S. Ct. 51 (1992).

SUMMARY OF ARGUMENT

The court of appeals correctly held that New York has created a limited forum in its public schools, as evidenced by the language of Education Law § 414. Its definition of the forum is consistent with this Court's decisions which recognize that, in opening an otherwise nonpublic forum, the state may limit the subject matter which may be presented.

Having defined the forum, the court correctly determined that the absence of religion from the list of uses permitted by the statute is both reasonable and viewpoint neutral and, therefore, constitutional. The statute draws a reasonable distinction between the use of schools for non-school purposes that serve the interests of the public in general, not purposes that serve the private interests of one group seeking to attract adherents to its point of view or, as here, to "instill[ ]" its values in the community's children "from an early age" (JA-86).[7] Religion is inherently such a private interest. The statute is viewpoint neutral because it does not authorize the presentation of any individual viewpoint for a purpose not included in the statute. In this case, petitioners were denied access not because they admittedly sought to present a *Christian* perspective, but because activities having a *religious* purpose are not a use permitted by the statute.

Petitioners' principal challenge to the constitutionality of Education Law § 414 is based on a flawed premise: that by allowing the schools to be used for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" pursuant to Education Law § 414(1)(c), New York has created a public forum in its schools, which is open to virtually any outside group for expressive activities. *See, e.g.*, Brief for Petitioners ("Pet. Br.") at 19. That argument overlooks the language of the statute itself, which includes nine other permitted categories of use which would be wholly unnecessary if petitioners were correct.

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7 References to pages of the joint appendix appear herein as "JA-___".

It also ignores numerous decisions by the commissioner of education finding uses other than religion unauthorized either by the paragraph on which petitioners rely or by the statute generally.

Petitioners' characterization of New York's policy as a form of "censorship" is equally without merit. Pet. Br. at 31; Brief Amicus Curiae of the Christian Legal Society et al. ("Christian Legal Soc. Br.") at 5. New York does not refer to religion or religious speech in the statutory provision at issue here, and does not single out religion for exclusion from non-school uses of its public schools. The commissioner's decisions illustrate that there are other non-permitted uses, having nothing whatever to do with religion.

There is no dispute that, if New York chose to do so, it could create the public forum for which petitioners advocate without offending the Establishment Clause. The decisions on which petitioners rely, *Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990), and *Widmar v. Vincent*, 454 U.S. 263 (1981), made clear that an equal-access policy would not violate the Establishment Clause of the First Amendment. New York has not adopted such a policy, and neither *Mergens* nor *Widmar* requires that it, or any other state, do so. Petitioners have cited no authority for the proposition that lies at the heart of their case: that a state, having once opened its public schools for limited, specified purposes, must, as a matter of constitutional mandate, add religious uses to the list.

The result urged by petitioners in this case would strip the state and localities of control over their public school facilities and allow them but a single choice: prohibit all non-school use of public school property, regardless of the civic or community value it might offer, and keep the school buildings in darkness whenever students are not being taught; or open those facilities to all applicants, regardless of their intended uses, on a first-come, first-served basis. The former option needlessly restricts the use of important, and often centrally located, public property, while the latter converts it into a public meeting hall available for rental by anyone willing to pay the price. A state

might choose to adopt either of those courses, but the First Amendment does not demand that its options be so limited.

ARGUMENT

I

THE CONSTITUTION DOES NOT REQUIRE NEW YORK TO EXTEND ITS LIMITED SCHOOL FORA TO RELIGIOUS USES.

The First Amendment does not guarantee a right of access to all publicly-owned property merely because it is owned or controlled by the government. *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. *Adderley v. State of Florida*, 385 U.S. 39, 47 (1966). The existence of a right of access to public property, and the extent to which the government may place restrictions on that right, depends on the character of the property, or "forum", at issue. *International Soc. for Krishna Consciousness, Inc. ["ISKCON"] v. Lee*, 112 S. Ct. 2701 (1992); *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

A. General Principles of Forum Analysis.

Three categories of fora have been recognized for First Amendment purposes. The "traditional public forum" includes streets, parks and other areas which "by long tradition or by government fiat have been devoted to assembly and debate". *Cornelius*, 473 U.S. at 802 (quoting *Perry*, 460 U.S. at 45). *See ISKCON v. Lee*, 112 S. Ct. at 2705-06. The only content-based exclusions a state may impose on traditional public fora are those which are narrowly drawn to serve a compelling state interest. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987); *Cornelius*, 473 U.S. at 800; *Perry*, 460

U.S. at 45. Petitioners have never contended that public schools are traditional public fora. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

At the other extreme is the "nonpublic forum", which describes public property "not by tradition or designation a forum for public communication". *Perry*, 460 U.S. at 46. *See also ISKCON v. Lee*, 112 S. Ct. at 2705. Limitations on expressive activity conducted on such property must only be reasonable and not predicated on disagreement with the speaker's view. *Id.* at 2705-06. *Board of Airport Commissioners*, 482 U.S. at 573 (quoting *Perry*, 460 U.S.at 46). *Accord Cornelius*, 473 U.S. at 806. Unlike the rules applicable to public fora, there is no requirement that restrictions on access to nonpublic fora be "narrowly tailored or the Government's interest compelling", nor is it required that a strict incompatibility exist between the "nature of the speech or the identity of the speaker and the functioning of the nonpublic forum". *Cornelius*, 473 U.S. at 808, 809. Respondents have never claimed that New York's public schools are non-public fora. Indeed, the purpose for enacting Education Law § 414 was to allow the community to benefit from the use of its schools after school hours.

The third category of forum is the "designated public place" forum, which is property that the state has intentionally opened for expressive activity. A designated public forum is not created by the government's inaction, or by its allowance of limited discourse, but, rather, by its intent. The courts therefore look "to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum". *Cornelius*, 473 U.S. at 802 (quoting *Perry*, 460 U.S. at 46). In addition, if the "objective, physical characteristics" of the property at issue, together with the actual public access and uses which have been permitted by the government, indicate that expressive activity would be "appropriate and compatible" with those prior uses, then the property has been designated as a public forum. *ISKCON v. Lee*, 112 S. Ct. at 2716, 2718 (Kennedy, J., concurring in the judgment).

A designated forum need not be the equivalent of a traditional public forum. A state may designate a forum for use by part or all of the public, *ISKCON v. Lee*, 112 S. Ct. at 2705, or, as the court below recognized, it may open the forum only for the discussion of certain topics. *See Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 46 n.7 and 48. Uses not specified in the designation of the forum may be excluded in the same way that uses may be excluded from a non-public forum. Accordingly, even if the exclusion is based upon subject matter, as in this case, or the speaker's identity, the exclusion need only be reasonable and viewpoint-neutral to pass constitutional muster. *Cornelius*, 473 U.S. at 800; *Perry*, 460 U.S. at 48. *See Board of Airport Comm'rs*, 482 U.S. at 573. *See also Greer v. Spock*, 424 U.S. 828 (1976) (political candidates can be excluded from speaking at a military reservation even though other members of the public are permitted to speak on other subjects); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (city can exclude political advertising from advertising space in public transit system); *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Rel. Comm.*, 429 U.S. 167 (1976) (public meeting of school board was forum for discussion of matters relating to school system). *See also Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 680 (2d Cir. 1988).

B. New York's Schools are "Limited" Public Fora.

The Second Circuit held, correctly, that New York's public schools fit squarely into the category of limited public fora. The State has designated its schools to be opened, at the discretion of the local school district, for non-school use, but has expressly (and reasonably, *see* Point I.D., *infra*) limited the purposes for such use through legislated policy and consistent administrative practice.[8] Section 414 therefore cannot be read,

8 Because respondent Attorney General intervened to defend the constitutionality of section 414, he takes no position on the rules adopted by the local school district or their application in this case. However, the United States, as amicus curiae, agrees that the local school district was "not wholly indiscriminate" in granting access to

and has never been read by New York's education commissioner, to open the schools for "indiscriminate use by the general public", *Hazelwood*, 484 U.S. at 267 (1988) (quoting *Perry*, 460 U.S. at 37), as petitioners contend. Pet. Br. at 18-19.

1. The language of the statute

Section 414 sets forth ten categories of use to which local school districts may put their schoolhouses. Petitioners isolate a single one, found in paragraph 414(1)(c), and contend (Pet. Br. at 19) that the grant of authority to open schools for "social, civic or recreational" purposes creates a "forum generally open to the public", *id.* (quoting *Perry*, 460 U.S. at 45). They argue that

> it would be difficult to imagine a more expansive use policy than one explicitly open to any 'social, civic, or recreational use'.

Pet. Br. at 19. Amici American Civil Liberties Union et al. echo the argument. Brief Amicus Curiae of the American Civil Liberties Union et al. ("ACLU Br.") at 15.

The very existence in the statute of nine other designated categories of use demonstrates the fallacy of petitioners' argument. If paragraph (1)(c) alone accomplished the broad forum petitioners contend, then each of the other categories, found in paragraphs (1)(a), (b), and (d) through (j), would be superfluous. Yet the statute contains another paragraph providing for a "civic" use [¶ (1)(f)], and still another providing for a use that easily meets that description, *i.e.*, ¶ (1)(e), permitting use of schools for polling places, voter registration and nonpartisan political meetings. Moreover, since the enactment of the original statute in 1913, including the "social, civic and recreational" authority on which petitioners rely, the Legislature has amended or added to the statute no fewer than sixteen times. It is a basic principle of statutory construction that a statute should not be construed in such a way as to render any

its after-school forum. Brief for the United States as Amicus Curiae Supporting Petitioners ("United States Br.") at 11.

of its provisions superfluous or insignificant. *Rosado v. Wyman*, 397 U.S. 397, 415 (1970). *See Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970-71 (5th Cir. 1981) (quoting *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976)). The construction urged by petitioners, that paragraph (1)(c) is all-encompassing and opens the schools indiscriminately to all public non-school uses, would produce just that result.

2. Administrative interpretations of Section 414

The administrative interpretations of section 414 have confirmed that its reach is limited and not "expansive". *See* pages 4 through 7, *supra*. As this Court wrote in *Perry*, "selective access does not transform government property into a public forum". 460 U.S. at 47. *See also Cornelius*, 473 U.S. at 802.

As early as 1914, the year after the statute's enactment, the commissioner determined that because "religious use" was not included in the language of section 414, it was not included in the forum created by the statute. *Appeal of Kennedy*, 2 State Dep't Rep. 625 (Educ. Dep't 1914) ("The use [of the school house] is not permissible for any other purpose than those specified."). The New York Appellate Division held essentially the same thing, for the same reason, in *Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dep't 1978), and the Second Circuit adopted that holding in *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 680 (2d Cir. 1988), and in this case. 959 F.2d at 386-87 (10a-11a).[9] *Compare Lewis v. Board of Educ.*, 247 App. Div. 106, 286 N.Y.S. 174 (1st Dep't), *rearg. and motion denied*, 247 App. Div. 873, 288 N.Y.S. 751 (1st Dep't 1936), *appeal dismissed*, 276 N.Y. 490,

9 The United States (United States Br. at 3 n.2), suggests that *Trietley* would probably be decided differently under the Equal Access Act, which was passed after the case was decided. That result would not change the interpretation of the statute adopted by the Second Circuit. If the meaning ascribed to a state statute by a court of appeals is a rational construction of the statute and is not "plainly wrong", this Court will normally accept it. *Edwards v. Aguillard*, 482 U.S. 578, 609 (1987) (White, J., concurring in the judgment) (collecting cases). That "usual rule" applies in First Amendment cases like this one. *Id.*

12 N.E.2d 172 (1937), in which the Appellate Division held that religious organizations are permitted to use the public schools "for the conduct of ethical, educational, and cultural purposes, [but] *in no way for the inculcation of religious tenets*" (emphasis added).[10]

The detail with which the New York Legislature wrote its grant of authority to local school districts to open their school buildings, together with the consistent history of its application in the nearly eighty years of its existence, demonstrate that New York has not, by intention or by practice, created the sort of indiscriminate access that marks a forum designated to be public for all purposes. Public access to the closed after-hours schools is not "inherent in the open nature of the locations", as it is for most streets and parks, but remains, in each instance, a "matter of grace by government officials". *ISKCON v. Lee*, 112 S. Ct. at 2711 (O'Connor, J., concurring) (quoting *United States v. Kokinda*, 497 U.S. 720, 743 (1990) (Brennan, J., dissenting)). The Second Circuit therefore correctly held that New York treats its schools, by statute and by administrative practice, as limited fora.

C. The "Limited Forum" as a Limited Forum.

In disputing the finding made by the Second Circuit, petitioners contend that the court's use of the term "limited" to describe the forum created in New York's schools was "aberrant". Pet. Br. at 25. In their view, "there is no separate category of 'limited public forum' distinct from 'designated public forum' ", *id.* at 26, because the term "limited" is merely a synonym for the word "designated". *Id.* at 24. That argument, on its face, strains the language, for the two words cannot be interpreted as having the same meaning.

10 In this respect the United States (Br. at 8-15) errs in contending that this case is controlled by *Widmar v. Vincent*, 454 U.S. 263 (1981). Its argument begs the fundamental issue of this case: the nature of the forum established in New York's schools. In *Widmar*, which the United States contends is indistinguishable from this case, there was no dispute that the forum involved was "generally open to the public". 454 U.S. at 268-69. Having created a "generally open forum", *id.* at 269, the university could not then make exclusions based on content. On the other hand, as the Second Circuit correctly held, the facts of this case showed the creation of a forum not "generally open to the public" but, instead, limited to the purposes set forth in Education Law § 414. *Widmar* thus has no application here.

A more sensible interpretation gives the words their common meanings: a government may convert an otherwise-closed property into a forum by *designating* it to be so. The government is not, however, left with the choice between no forum and a broad, "first-come, first-served" open forum, such as the dedication of a new park. Instead, it may *limit* its designation of the forum based upon the category of speakers who may use it or, as both petitioners and the United States agree, the subjects that may be discussed there. Pet. Br. at 22-23; United States Br. at 9-10 and n.8. Otherwise, as Justice Blackmun observed in writing for the plurality in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." 418 U.S. at 304.[11]

The Second Circuit has used the term "limited forum" to refer to the type of designated forum created when a state designates public property to be used as a forum only for some purposes, but not for others. *Deeper Life Christian Fellowship,*

11 Amici ACLU et al. argue that the Court meant something other than what it said in suggesting the existence of a limited forum. They contend that the Court, although it did not in fact limit its reference, meant to refer *only* to meetings of public bodies, where persons attending must "stick to the business at hand", ACLU Br. at 6, and that the sole purpose for a limited forum is to allow a government body to "perform its official functions" by "maintain[ing] control over its own agenda". *Id.* at 14. While that description accurately describes the facts in *City of Madison, Joint School Dist. No. 8 v. Wisconsin Empl. Relations Comm'n*, 429 U.S. 167 (1976), cited by the ACLU, the description does not accommodate other cases in which the Court described the limited designation of the forum involved, where the purpose of the forum was to address not a government body but other participants in the forum. *See, e.g., Cornelius, Perry.*

852 F.2d at 679-80; *Calash v. City of Bridgeport*, 788 F.2d 80, 84 (2d Cir. 1986). The Third Circuit has similarly interpreted the notion of a limited public forum as being "designated for only limited uses or for a limited class of speakers". *Brody by Sugzdinis v. Spang*, 957 F.2d 1108, 1118 (3d Cir. 1992) (quoting *Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors*, 776 F.2d 431, 436 (3d Cir. 1985)).

> Restrictions of this type do not mean that the forum is non-public, but show that the government has created a 'limited public forum', a subset type of designated public forum, whose scope is circumscribed either by subject matter or category of speaker.

Id., 957 F.2d at 1118. *See also Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1261 (3d Cir. 1992), in which the Third Circuit adopted the limited-forum analysis of the Second Circuit in *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688 (2d Cir. 1991), discussed at page 19, *infra*. The Ninth Circuit has held similarly. *Monterey County Democratic Central Comm. v. United States Postal Serv.*, 812 F.2d 1194, 1196 (9th Cir. 1987) (only non-profit civic leagues or non-partisan organizations permitted to conduct voter registration drives on Postal Service property; partisan voter registration efforts prohibited).

The term "limited forum" as used by the Second, Third and Ninth Circuits is therefore neither novel nor "aberrant".[12]

12 Nor is the notion of a "limited" forum "badly circular", as petitioners (Pet. Br. at 26) and the ACLU (ACLU Br. at 16) contend. The difficulty with petitioners' argument is that it assumes the limited forum is defined by what it does *not* include, rather than—as the Second Circuit properly defined it—what it *does* include. A limited forum defined by a "content-based exclusion of speech" would likely prove circular, for the reasons asserted by petitioners and the ACLU. But the limited forum established by Education Law § 414 is defined by what it *includes*, namely, the categories of use set forth in the statute itself. Petitioners' characterization of the Second Circuit's holding as establishing a "religion-free" forum is, for that reason, misleading at best. *See* Pet. Br. at 26. Further, it is logical, and not at all circular, to conclude that whatever is not included by the statute is excluded. *See, e.g., Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (it is a general principle of statutory construction that when a statute enumerates specific things or acts, by implication it excludes those things or acts not enumerated, in the absence of contrary legislative intent).

Moreover, in suggesting that the Second Circuit has taken an "aberrant approach" in its forum jurisprudence, Pet. Br. at 25, petitioners ignore decisions which demonstrate that the Second Circuit will enforce a right of access for religious use when, in a particular case, a local school district exceeds the authority granted by section 414 and creates a forum for it by allowing other religious uses. That the Second Circuit did not do so in this case is simply a matter of the facts presented by petitioners, not a defect in the court's analysis.[13]

In *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688 (2d Cir. 1991), the local school district had permitted a religious Christmas program, "intended to celebrate the birth of Jesus", which consisted of Christian hymns and a Bible reading. 927 F.2d at 693. In the light of that practice, the Second Circuit held that the local district could not refuse another applicant for religious use on the ground that its proposal was not authorized.

> Permitting a fund-raiser with a religious theme while excluding one with a different religious theme is not viewpoint-neutral as a matter of law, absent a constitutionally sufficient explanation for the differential treatment.

Id. at 694.

Similarly, in *Deeper Life Christian Fellowship*, the Second Circuit upheld a preliminary injunction requiring the city board of education to allow a church to use the school building for worship services. The record in that case showed that the school board had "opened this forum" to the church by permitting other religious organizations to use the facilities, 852 F.2d at 680, and therefore the court of appeals could not say

13 The district court, after a factual hearing on the preliminary-injunction motion and after summary-judgment briefing, 770 F. Supp. at 98, 99 (30a, 31a-32a), specifically rejected petitioners' argument that their proposed use was an activity "of the sort permitted in the forum". Pet. Br. at 24. The Second Circuit affirmed that finding. 959 F.2d at 388 (13a-14a).

that the district court had abused its discretion in granting preliminary relief.

These decisions, together with the decision in the present case, demonstrate that the Second Circuit has properly applied the precedents of this Court to the facts of each case arising under New York's statute. To suggest, as petitioners do, that such a practice is "aberrant" is, in effect, to advocate for the jurisprudence of "categories" already rejected by this Court. *ISKCON v. Lee*, 112 S. Ct. at 2707. Thus, to create a general category of "public schools", or even "school facilities made available for social, civic, or recreational use by outside groups", as petitioners urge, would "unjustifiably elide what may prove to be critical differences" between states and school systems of which the Court should rightfully take account.[14] *Id.*

The decisions of other circuits upon which petitioners rely are not inconsistent. In particular, they do not stand for the broad proposition that "school facilities made available for social, civic, and recreational use by outside groups are designated public fora subject to the strict standards governing public fora". Pet. Br. at 19-20 n.8. *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991), involved a local school board policy allowing "any group [to] use the [school] facilities, as long as they do not seek to propagate or propound a religious message". 941 F.2d at 46. The school district had never refused access to any group other than religious organizations. *Id.* at 47.[15]

14 *See id.* at 2724 (Souter, J., concurring in the judgment in No. 91-339 and dissenting in No. 91-155); *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion of O'Connor, J.) (implicitly rejecting the categorical approach by examining whether "[t]he postal sidewalk at issue . . . [has] the characteristics of public sidewalks traditionally open to expressive activity"). *See also Brody by Sugzdinis v. Spang*, 957 F.2d 1108, 1120 (3d Cir. 1992) ("Public forum analysis is . . . highly fact-dependent"); ACLU Br. at 5-6 ("The question of when a religious group's use of government property presents a valid claim of equal access . . . turns on issues of context that necessarily are fact-specific").

15 The school district in *Grace Bible Fellowship* also had granted access for activities, such as (non-religious) fund-raising (*id.*), that would be unauthorized in New York schools under section 414.

Gregoire v. Centennial School Dist., 907 F.2d 1366 (3d Cir.), *cert. denied*, 111 S. Ct. 253 (1990), expressly turned on the facts of the case, which showed that the school district had allowed a wide range of uses, including some religious uses but not others. *Id.* at 1369, 1373-76. In *Brody by Sugzdinis v. Spang*, 957 F.2d 1108, 1119 (3d Cir. 1992), the Third Circuit clarified its finding that the *Gregoire* school had been designated as a public forum, explaining that the school had opened its auditorium

> extensively to various groups including local labor unions and the Rotary Club, *and had even permitted religious speech* in an afternoon student forum, but had only denied access for an evening event by the particular non-student religious group.

Id. (emphasis added, citations omitted). It was because the particular religious group in *Gregoire* had been "singled out" for exclusion, *Brody*, 957 F.2d at 1119, while all others were granted access, that the Third Circuit found the school to have demonstrated an intent to designate it a public forum. *Id.*

The access policies at issue in *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973), and in *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978), also differed from that of New York. In *National Socialist White People's Party*, "[e]xcept for a few groups which had previously damaged school property, *no group ha[d] been denied the use of an available auditorium*" except the applicant in that case. 473 F.2d at 1013 (emphasis added). The school board had granted authority to a "wide variety of public and private groups on a first-come first-served basis". *Id.* Similarly, in *Knights of the KKK, Realm of Louisiana*, the state's policy was an "indifferent one", *id.* at 1128, "analogous to dedicating a public park: it threw open the doors of the gymnasium in question for after-hours use by all comers, on a first-come, first-serve basis." *Id.*[16]

16 The district court decisions on which petitioners rely also fail to support the broad generalization they advocate (Pet. Br. at 19-20

By contrast, New York has never been "indifferent" on the issue of access, much less "thr[own] open the doors" of its schools to "all comers" on a "first-come, first-served basis". Instead, Education Law § 414 specifies the only uses for which those doors may be opened, and the commissioner has consistently enforced its limitations.

D. New York's Limited Forum is Constitutional.

Public property that has been designated as a limited forum remains a "nonpublic forum" with regard to persons and purposes that are not included in the forum's definition, and the rules regulating access are the same as those applicable to nonpublic fora. *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 48. Petitioners acknowledge as much. Pet. Br. at 23. Restrictions that do not limit activities specifically designated for inclusion in the forum need only be "reasonable and 'not an effort to suppress expression merely because public officials oppose the speaker's view' ". *United States v. Kokinda*, 110 S. Ct. at 3121 (quoting *Perry*, 460 U.S. at 46). The restriction "need not be the most reasonable or the only reasonable limitation". *Cornelius*, 473 U.S. at 808. New York's statute meets both aspects of the applicable test.

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n.8). *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshippers*, 735 F. Supp. 745 (M.D. Tenn. 1990), did not involve an access policy limited to "social, civic, and recreational" purposes, as petitioners contend, but rather presented a policy of allowing the local school to be "ordinarily used for public events *of all types*". 735 F. Supp. at 752 (emphasis added). The school district in *Wallace v. Washoe Co. School Dist.*, 701 F. Supp. 187 (D. Nev. 1988), had made its facilities "open to the general public", *id.* at 189-90; the court's opinion did not suggest that any attempt had been made to limit the authority to do so. And in *Country Hills Christian Church v. Unified School Dist. No. 512*, 560 F. Supp. 1207 (D. Kans. 1983), the school district had opened its facilities to "recognized community groups"; the dedication of the buildings to that indiscriminate purpose made them "virtually the same, in concept, as streets and parks as far as the First Amendment is concerned". *Id.* at 1215.

1. New York's definition of the forum is reasonable

New York has always treated the limited opening of its school buildings during non-school hours as a means to foster the general knowledge of the community. In 1913 the Education Department had urged wider use of the school buildings for the "betterment of [the people's] social and intellectual standards", *1913 Report* at 41-42, and it was shortly after that advice that the predecessor to Education Law § 414 was enacted. As the Second Circuit found in *Deeper Life*:

> [T]he thrust of the statute is to promote general knowledge, *rather than to provide a forum for proselytizing or indoctrinating the public in a particular group's beliefs.*

852 F.2d at 680 (emphasis added). The long and consistent history of the statute's application towards that purpose precludes a claim that it has "no other government purpose than the provision of a place for expression". AFL-CIO Br. at 3, 11. Instead, the forum designated by Education Law § 414(1)(c) is limited to uses intended or designed to "pertain[ ] to the welfare of the community".

The ten purposes set forth in Education Law § 414(1) may be grouped conceptually into two categories which fulfill the statute's purpose. The first covers the type of activities with which public schools are traditionally associated: education and activities for children. This category includes

> — instruction in any branch of education, learning or the arts [paragraph 414(1)(a)];
>
> — instruction of mentally-retarded minors in classes provided by a private organization approved by the commissioner of education [¶ (1)(g)];
>
> — recreation, physical training and athletics [¶ (1)(h)];
>
> — child care [¶ (1)(i)]; and
>
> — graduation exercises by not-for-profit elementary and secondary schools, so long as no religious service is performed [¶ (1)(j)].

The second category includes the remaining six uses:

— public-library uses [¶ ((1)(b)];

— the "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" at issue here [¶ (1)(c)];

— meetings, entertainments and occasions where admission fees are charged [¶ (1)(d)];

— use for polling places, voter registration and non-partisan political meetings [¶ (1)(e)]; and

— civic forums and community centers [¶ (1)(f)].

Each of those uses supports the distinction recognized by the Second Circuit in *Deeper Life* that under New York law "access to the school property is permitted *only where it serves the interests of the public in general*, rather than that of sectarian groups." 852 F.2d at 680 (emphasis added). In the service of that distinction, for example, the statute allows political meetings, but precludes those meetings from being sponsored by a political organization unless authorized by the vote of a district meeting. Education Law § 414(1)(e); *Appeal of Gaskin*, 1 Educ. Dep't Rep. 673 (1961).

The community-service/private-interest distinction in public-school uses embodied in section 414 is the most fundamentally reasonable distinction that can be made concerning access to public properties, and especially public schools, that are not by tradition opened for public speech. Unlike the community purposes for which authority is designated in the statute, religion is an "individual experience", *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting in part), that is "inviolately private". *Everson v. Board of Educ.*, 330 U.S. 1, 58 (1947) (Rutledge, J., dissenting). Religion "must be a private matter for the individual". *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971). Religious advocacy, like petitioners' effort to persuade community residents to "instill[ ]" "Christian values" in their children "from an early age" (JA-86), serves the community only in the eyes of its adherents and yields a benefit only to those who already believe.

To require New York to extend its limited forum to provide a pulpit for religious advocacy like that at issue here would inescapably "interfere in a significant way with the uses to which the government has as a factual matter dedicated the property". *ISKCON v. Lee*, 112 S. Ct. at 2718 (Kennedy, J., concurring in the judgment). *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 571-73 (1975) (Rehnquist, J., dissenting), suggesting that a city could properly devote its municipal auditorium to the cultural enrichment of "the whole family" without thereby being required to provide a forum for other purposes. *See also* AFL-CIO Br. at 9. *Cf. Widmar*, 454 U.S. at 267 n.5 (1981) ("We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.").

Indeed, requiring New York to add religious advocacy to its school-based forum would convert the state's public schools from the limited community-service fora which the statute contemplates into the "functional equivalent of a municipal auditorium or hall" which amici ACLU et al. contend they should be. ACLU Br. at 6. In short, neither law nor fact demands that New York drastically alter the definition of its after-school fora in order to accommodate petitioners' desire for a forum not otherwise available to them.[17]

2. New York's definition of the forum is viewpoint-neutral.

Petitioners, supported by the United States, contend that section 414 is not viewpoint-neutral and, in particular, that it is

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17 There is no suggestion in the record that, absent the use of Center Moriches' school, petitioners were unable to present their film series. The availability of alternative channels of communication supports the conclusion that the limitations on New York's forum are reasonable. The First Amendment does not demand unrestricted access to an otherwise–nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message. *See Cornelius*, 473 U.S. at 809; *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. at 129.

"anti-religious". Pet. Br. 31. *See* United States Br. at 20. The argument confuses the concepts of viewpoint neutrality and content neutrality. As Justice Brennan explained in his dissent in *Perry*, viewpoint neutrality refers to particular speakers, not whole categories of speech. 460 U.S. at 59 (Brennan, J., dissenting). It is the principle of content neutrality, not viewpoint neutrality, that is relevant where restrictions are imposed on "speech related to an entire subject area", *id.*, and content neutrality is not required where, as in this case, the forum is limited. *See* discussion at pages 12-13, 22, *supra*.

Section 414 does not present an issue of viewpoint discrimination because the unavailability of New York's schools for religious purposes, among others, is not based on an objection to the tenets of any particular religious group. Section 414 provides no discretion to grant permits for any religious uses. *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79, 83 (2d Cir. 1991). The restriction of public-school use to the purposes set forth in Education Law § 414 is therefore "not aimed at particular parties, groups, or points of view", *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973), and was properly regarded as viewpoint neutral by the court below. *See also Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).

To the extent that petitioners, supported by the United States (United States Br. at 17-19), contend that section 414 precludes the "religious" viewpoint of some otherwise-permissible subject, the question is not presented by this case.[18] Petitioners did

18 From the record, it appears that the local school board decided only that petitioners' film series was not permissible because of its conceded religious purpose, without reaching the question of whether the film series would have satisfied section 414 if it had not been religious in nature. There is therefore no support for petitioners' suggestion, and the United States' fundamental assumption that petitioners' film series was "otherwise permissible" under the statute. *See* Pet. Br. at 16.

In any event, under state law it is the applicant who has the burden of demonstrating that its proposed use meets a criterion of section 414. *E.g.*, *Appeal of Smith*, 15 Educ. Dep't Rep. 491 (1976); *Matter of Use of the School-house in District No. 4*, 5 State Dep't Rep. 618 (Educ. Dep't 1915). Thus, beyond the bare assumption that their proposed use would have met a criterion in section 414, as to which the record contains no finding, there is no basis for petitioners or amici to argue that petitioners have been excluded from a forum in which their film series would "otherwise [have been] permissible". United States Br. at 17. *See* Christian Legal Soc. Br. at 29.

not seek to present the viewpoint of "religion"; their viewpoint was limited to, and described by them as, that of "*Christian* values" (JA-86) (emphasis added) and the "*Christian* perspective" (JA-91) (emphasis added). The district court found, and the court of appeals affirmed the finding, that the statute did not provide for any religious use whatever, 959 F.2d at 386-87 (10a-11a), and that the local school district had not made a forum available to any religious perspectives at all. *Id.* at 388 (14a). Therefore, petitioners' Christian viewpoint was not discriminated against while the viewpoint of another religion was permitted. Rather, all religious use, including petitioner's, was properly not included in the forum. *See Widmar*, 454 U.S. at 281 (Stevens, J., concurring) (university could not allow "a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege"); *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Rel. Comm.*, 429 U.S. 167, 175 (1976) (viewpoint discrimination prohibits granting to "one side of a debatable public question . . . a monopoly in expressing its views").

Furthermore, petitioners' reliance upon an undifferentiated "religious" viewpoint threatens to dissolve the important difference between generalized "content" and individual "viewpoint" as those terms have been used by this and other courts. *See e.g.*, *Perry*, 460 U.S. at 59 (Brennan, J., dissenting); *Monterey Co. Democratic Cent. Comm. v. United States Postal Serv.*, 812 F.2d 1194, 1199 (9th Cir. 1987) (rejecting "expansive characterization of the collective position of all partisan groups as a 'viewpoint' "). Any use, even one expressly prohibited, can be presented as somehow a "viewpoint" of some other, permitted use. *Cf. Appeal of Gaskin* (prohibited meeting with political candidates presented as a form of "civic" use).

For example, meetings of labor union locals are not authorized by section 414, *see Appeal of Brett*, but if viewpoint means nothing more than petitioners urge, a labor union local could argue that its meetings should be held in the school's auditorium because the activities to be discussed are designed to provide higher wages, thereby improving workers' family lives. Section 414 authorizes only non-school uses, *Appeal of Weiss*, but any "school related use" can easily be presented as having the "purpose" of enhancing a family's raising of its children.

Petitioners' argument that religion is merely the viewpoint by which they would discuss "contemporary family values" would thus remove all limitations from this limited forum, and the device would effectively accomplish indirectly what petitioners set out to accomplish openly: the abolition of the limited forum, where decisions about access may be based upon content. For the reasons already discussed in Part I.C., *supra*, that result is not required by the First Amendment.

To agree with petitioners, that a forum opened for some limited purposes must also be opened to religious purposes, presents the state with the stark choice between indiscriminate access and no access. Faced with that all-or-nothing choice, governments will likely decline opportunities to create fora in their property. The Solicitor General, representing the petitioner in *Cornelius*, recognized the important public benefit put at risk by indiscriminate access, arguing in that case that:

> The decision of the court of appeals [requiring open access] ultimately would force the President to restructure the Campaign quite substantially or, alternatively, to abolish the Campaign entirely.

Brief for Petitioner at 16. "The First Amendment does not mandate a result so at odds with common sense." *Id.*

The present circumstance illustrates the point well: If neither New York nor any of its local school districts has any more choice than to lock the school-house doors as soon as the last pupil and teacher have left, or to keep them wide open to "all comers", then at least some of those school districts may opt

for the former and close the forum altogether. The First Amendment interest in encouraging the marketplace of ideas, *Widmar*, 454 U.S. at 267-68 n.5 (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)), is not furthered, and no public interest is served, by that result.

II

SECTION 414 DOES NOT UNCONSTITUTIONALLY RESTRICT CONTENT

Petitioners contend that, "[e]ven apart from the First Amendment forum doctrine" (Pet. Br. at 31), the "policy in question" in this action represents unconstitutional content-based censorship of pure speech. *Id.* Despite their disclaimer, the argument is a variation of their forum argument, as petitioners themselves make clear by their citation to *Widmar* (Pet. Br. at 34). Further, to the extent that it is addressed to the policy established by Education Law § 414, it is unfounded.

Petitioners' argument is premised on their contention that the "Second Circuit held that a public school district may deny outside organizations equal access to the after-school use of its facilities *solely on the basis of the religious content or purpose of the planned use*." Pet. Br. at 32. Petitioners err, however, because that is not the issue presented by the New York statute. Instead, the Second Circuit correctly held that it did not offend the Constitution for New York to decline to include religion in the forum it had designated for matters of general community interest. The state could reasonably, and therefore constitutionally, not extend its limited forum to religious purposes. Point I, *supra*.

Additionally, religious speech is but one of the many potential uses to which New York has not opened its public schools. *See* pages 6-7, *supra*.[19] Thus, the statute makes no attempt to

19 The one case cited by petitioners on this point, *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105 (7th Cir. 1986), did state in *dictum* that the "government's interest in interfering with the free

"single out and censor" (Pet. Br. at 33) any speech, religious or not, nor does it have that effect. Instead, the relevant inquiry in each case is whether the purpose of a proposed use fits any of the categories for which the schools have been opened. Beyond those categories, no one is entitled to access for any purpose, religious or otherwise.[20] As petitioners agree, a speaker is not "automatically free from otherwise lawful regulation simply because the speaker communicates religious sentiments". Pet. Br. at 33 (footnote omitted).[21]

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market in ideas through discriminatory restrictions on particular points of view (such as the religious) is slight". *Id.* at 1114. However, the Seventh Circuit affirmed summary judgment for the school district, and held that the school district had not created a public forum for meetings by allowing teachers to discuss labor relations; by hosting meetings of the P.T.A., the Boy Scouts, the Girl Scouts, "fine arts groups" not further defined, and booster clubs; by allowing the school to be used as a polling place on election day; by permitting a religious group to use a school for a time after its church burned down; or by allowing any meetings by teachers except prayer meetings. *Id.* at 1114-15. Additionally, the Seventh Circuit's holding further supports the conclusion that all school districts are not equivalent. *See* discussion at page 20 , *supra*.

20 As a matter of New York law, a local board of education has no authority to put its school building to extracurricular use beyond those granted it by statute. *E.g.*, *Basset v. Fish*, 75 N.Y. 303 (1878); *Appeal of Palmiter*, 64 State Dep't Rep. 222 (Educ. Dep't 1942). For that reason, the local school district respondents were in error in stating to the district court that

> [i]n the absence of Section 414 of the [New York] Education Law . . . the School District would be obligated to allow access to the facilities for religious groups on the same basis as any other groups may be allowed access.

Mem. in Support of Motion for Summary Judgment at 15 (Nov. 15, 1990), *as quoted in* Pet. Br. at 22. "In the absence of Section 414", the school district would be unable to allow *any* access to the school building after school hours, because it is only in that statute that the school district finds any authority to do so. Section 414 creates authority, it does not limit existing authority and does not "exclude" anyone.

21 Petitioners confuse the identity of the speaker, which is not an issue under Education Law § 414(1)(c), with the purpose of the proposed use. They contend that Lamb's Chapel was an "otherwise eligible speaker" (Pet. Br. at 31) and, "*as an entity*, is eligible to use school facilities for 'social, civic and recreational meetings'." *Id.* at 34 (emphasis in original). The briefs amicus curiae of the National Jewish Commission on Law and Public Affairs ("COLPA") (at 7) and the Christian Legal Society (at 2, 6) raise the same point. However, there has been no suggestion in this case, by the parties or the courts below, that the identity of the applicant rather than the nature of the proposed use has any bearing on the decision of how local school buildings may be used. *See* Christian Legal Soc. Brief at 4 n.1, conceding that the denial of access here was not based on the religious identity of the applicant.

Moreover, the New York courts have concluded that only "use" is relevant. *See Lewis v. Board of Education*, 157 Misc. 520, 525-26, 285 N.Y.S. 164, 169-70 (Sup. Ct. N.Y. Co. 1935), *modified*, 247 App. Div. 106, 286 N.Y.S. 174 (1st Dep't), *rearg. and motion denied*, 247 App. Div. 873, 288 N.Y.S. 751 (1st Dep't 1936), *appeal dismissed*, 276 N.Y. 490, 12 N.E.2d 172 (1937):

> The manifest vice of the plaintiff's position is that he has confused the racial and religious affiliations of the *users* of the school buildings with the *purpose* for which the buildings are used. The restrictions relate to the *use*. . . . It is the *use* to which the buildings are put, and not the *identity* of the users, that is decisive of the lawfulness of the use.

Id., 157 Misc. at 525-26, 285 N.Y.S. at 169-70 (emphasis original in official report).

22 See pages 20 through 22, *supra*, for discussion of these cases.

23 The argument made by the ACLU, which goes too far, helps to make this clear. They contend that New York's schools are "open to all speech except that which is excluded". ACLU Br. at 19. To the contrary, as the language and history of Education Law § 414 demonstrate, New York's schools are open to *no* speech except that which is *included* by the statute. *See also* Brief of COLPA at 3-4.

The absence of religious use from the list of authorized purposes therefore neither discriminates against, nor signals a hostility to, religion. Unlike the university policy struck down in *Widmar*, or the school policies at issue in the decisions of other circuits and district courts relied on by petitioners (Brief at 35 n.16)[22], Education Law § 414 does not "single[ ] out religion for direct discriminatory exclusion". Christian Legal Soc. Br. at 8. Section 414 does not even refer to religion, much less expressly prohibit religious use, and petitioners so concede (Pet. Br. at 9 n.5).[23]

Nor does section 414 impose a penalty or other sanction upon petitioners' desired speech, as in the cases they cite (Pet. Br. 32-33). Petitioners may freely engage in religious speech and, even after the local school board's decision, they may show their film series to anyone who chooses to see it, without state penalty. They simply have not been provided with the use of a public school in order to do so.[24]

III

SECTION 414 DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Petitioners assert that by not providing a forum for religion, Education Law § 414 violates the Establishment Clause. Pet. Br. at 36-37; Question Presented No. 4. The Second Circuit found it "difficult to see how this is so", 959 F.2d at 389 (15a), and rightly concluded that, "[i]f anything, a claim of a violation of the Free Exercise Clause would be expected". *Id.* Petitioners make no Free Exercise claim.

Petitioners demonstrate the validity of the Second Circuit's puzzlement by arguing, with no citation, that the "ultimate purpose" of the Establishment Clause is "the safeguarding of religious exercise against the power of the state". Pet. Br. at 37. The Establishment Clause is implicated here, they argue, because the case presents a "classic instance of explicit government repression of religion". *Id.* If, indeed, that were the "ultimate purpose", then the Free Exercise Clause would be mere surplusage. As this Court explained in *Lee v. Weisman*, 112 S.Ct. 2649, 2655 (1992) (quoting *Lynch v. Donnelly*, 465

24 Petitioners have not suggested that the public school was the only, or even the best, venue for their film series. By contrast, in *Widmar*, the plaintiff-students claimed to be "stigmatize[d]" because "having to explain that we meet off campus tends to make other students think there is something 'wrong' with us". *Chess v. Widmar*, 635 F.2d 1310, 1317 & n.9 (8th Cir. 1980), *aff'd sub nom. Widmar v. Vincent*, 454 U.S. 263 (1981). Petitioners here have made no such claim. *See* note 18, *supra*.

U.S. 668, 678 (1984)), the fundamental purpose of the Establishment Clause is to guarantee that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which " 'establishes a [state] religion or religious faith, or tends to do so' ". *See also Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970). Plainly, those concerns are not at stake here, and therefore the analysis required in Establishment Clause cases is inapplicable.

There is, in any event, no merit to petitioners' Establishment Clause claims.

A. The Establishment Clause Does Not Require Equal Access

Petitioners contend that, after *Mergens*, the decision to adopt an equal access policy would not offend the Establishment Clause. Pet. Br. at 21. Even if true, it still must remain the choice of the state whether to adopt such a policy at all. The Establishment Clause does not eliminate that choice. As Justice White wrote in dissent in *Widmar*:

> The Establishment Clause . . . sets limits only on what the State may do with respect to religious organizations; it does not establish what the State is *required* to do. . . . The step from the permissible to the necessary . . . is a long one.

454 U.S. at 282 (emphasis original). Furthermore, the First Amendment does not require that every protected speaker be provided with the chance to speak. *E.g., Miami Herald Publ. Co. v. Tornillo*, 418 U.S. 241 (1974). *See also Rust v. Sullivan*, 111 S. Ct. 1759 (1991). As this Court wrote in *Hazelwood*, 484 U.S. at 270-71,

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker* [*v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969)]—is different from the question whether the First Amendment requires

a school affirmatively to promote particular student speech.

If, as petitioners contend, the Establishment Clause standing alone required such a policy, then Congress would have had no need to adopt the Equal Access Act at issue in *Mergens*.[25] Yet, this Court has already found in *Mergens* that the Equal Access Act was intended to "do more than merely validate the status quo". 496 U.S. at 239. The language of the statute ("It shall be unlawful . . .") creates a right, rather than reflecting an existing one based in the Constitution. 20 U.S.C. § 4071(a). *See Student Coalition for Peace v. Lower Merion School Dist.*, 633 F. Supp. 1040, 1043 (E.D. Pa. 1986) (by enacting the Equal Access Act, Congress afforded students a right "beyond the constitutional guarantees in the first amendment").

Petitioners also suggest that the absence of such a policy reflects a hostility toward religion. Pet. Br. at 36. However, the statement from *Mergens* upon which they rely does not support that conclusion. Although the Court stated that:

> if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion,

496 U.S. at 248 (plurality), the sentence was part of the Court's discussion of *Widmar* and the finding in that case that the university had adopted an open-forum policy. Indeed, in a sentence following petitioners' quotation, the Court referred to the finding in *Widmar* that the university had made its facilities available to " '[a] broad . . . spectrum of groups'—both nonreligious and religious speakers". *Mergens*, 496 U.S. at 248, (quoting *Widmar*, 454 U.S. at 274). Accordingly, it is not merely the absence of a policy of access that evinces hostility, as petitioners assume, but the exclusion of religion when the door is open to everyone else. That is not this case.

25 Although Justice Stevens, dissenting in *Mergens*, suggested that the Equal Access Act was intended by Congress to "preclude continued unconstitutional discrimination", 496 U.S. at 274, his discussion pertained to the forum issue, not to the Establishment Clause argument urged by petitioners here.

B. Enforcement of the Forum's Definition Does Not Violate the Establishment Clause

Petitioners also contend that the Establishment Clause will be violated by local school districts in implementing Education Law § 414. They believe that the local school district will "inevitably entangle itself" with religion by the "mere enforcement" of the policy defining the forum, because someone will need to determine "which words and activities fall within 'religious worship and religious teaching' ". Pet. Br. at 37 (quoting *Widmar*, 454 U.S. at 272 n.11).

The issue is not presented in this case because petitioners conceded in the district court that their proposed school use was "of a religious nature and [was] for a religious purpose." 770 F. Supp. at 92 (18a). They have never claimed otherwise. Indeed, the brochure they submitted to the local school board describes one of its purposes as advocating that "Christian values [be] instilled from an early age" (JA-86).

The argument, in any event, lacks merit, and to the extent that petitioners direct it to the state statute, their fears are unwarranted. No perfect separation of church from state is possible, and the First Amendment recognizes that fact. *Walz v. Tax Comm'n*, 397 U.S. 664, 669-70 (1970). "The very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement." *Id. See also Lemon v. Kurtzman*, 403 U.S. 602 (1971).[26] That standard is not violated by section 414.

The statute does not require the local school district to determine "which words and activities fall within 'religious worship and religious teaching' ", as petitioners contend, because that determination is simply not relevant. Instead, the statute asks an applicant to identify the *purpose* for the proposed use of a public school, and under state law it is the applicant's burden to demonstrate that the proposed use meets one of the criteria of section 414. *See Appeal of Smith*, 15 Educ. Dep't Rep. 491

26 Petitioners do not allege that the New York statute fails either of the other prongs of the three-part *Lemon* test.

(1976); *Matter of Use of the School-house in District No. 4*, 5 State Dep't Rep. 618 (Educ. Dep't 1915).

Any entanglement occasioned by asking an outsider why it proposes to use a public school is not, in light of the circumstances, excessive. A state may, without offending the Establishment Clause, require an organization which applies for a regulatory exemption, granted by statute to religious organizations, to "prove that [it] is a religious organization" within the meaning of the statute. *Larson v. Valente*, 456 U.S. 228, 255 n.30 (1982). If the implementation of Education Law § 414 results in any entanglement with religion, it is no more excessive than that in *Larson*. *See also Walz v. Tax Comm'n* (tax exemption for "properties used solely for religious worship" does not violate Establishment Clause).

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit, upholding the constitutionality of New York Education Law § 414, should be affirmed.

Dated: New York, New York
December 29, 1992

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FOR ARGUMENT

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No. 91-2024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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LAMB'S CHAPEL and JOHN STEIGERWALD,
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CENTER MORICHES UNION FREE SCHOOL DISTRICT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

ARGUMENT *

By policy and practice, the respondent Center Moriches Union Free School District (CMUFSD) has opened its public school facilities during non-school hours to a broad array of non-student community uses. Pet. Br. at 3-6, 18-19. Despite this policy and practice, CMUFSD refused petitioners Lamb's Chapel and John Steigerwald (collectively, "Lamb's Chapel") access to show a film, free of charge and open to the public, addressing contemporary family issues. Pet. Br. at 6-8.

CMUFSD explicitly forbids use of school premises "by any group for religious purposes." *See* Rules and Regulations for Community Use of School Facilities [hereafter, "Rules & Regs."] #7 (Pet. App. 57a). CMUFSD

* Petitioner Lamb's Chapel is a non-profit corporation. It has no parent company or subsidiaries.

applied this ban on religious uses to Lamb's Chapel based upon the religious *content* and *viewpoint* of the film Lamb's Chapel planned to show. Pet. Br. at 6-8, 23-24, 29-30, 34. This case therefore presents, as amicus Christian Legal Society describes it, "a remarkable paradigm of First Amendment violations." Br. Amicus Curiae of the Christian Legal Society et al. at 1.

CMUFSD concedes that its policy and practice allow for a " 'wide diversity of outside groups to use its facilities,' " Brief for Respondents (hereafter, "CMUFSD Br.") at 22 (quoting Pet. Br. at 19). CMUFSD further concedes that its facilities constitute a "designated public forum" for free speech. CMUFSD Br. at 22. Finally, CMUFSD concedes that its "decision to exclude petitioner was due to the admittedly religious *nature* of the *film*," *id.* at 1 (emphasis added), and was likewise "due to the decidedly religious *perspective* of the *film*," *id.* at 2 (emphasis added). It follows that CMUFSD has engaged in discriminatory, antireligious, content-based and view-point based censorship of pure speech [1] by private parties. A more flagrant violation of First Amendment rights would be difficult to imagine. *See* Pet. Br. §§ I, II, III.

CMUFSD and its fellow respondent New York State Attorney General's Office nevertheless raise a host of counter-arguments, often at cross-purposes to each other, in an attempt to defend CMUFSD's unconstitutional censorship. None of these counter-arguments withstands legal analysis.

I. THE CMUFSD FACILITIES CONSTITUTE A DESIGNATED PUBLIC FORUM FOR FREE SPEECH.

A government body creates a "designated public forum" for free speech when it opens government facilities to general use by the public or some segment of the public.

[1] Films are, of course, speech within the free speech and free press guarantees of the First Amendment. *Burstyn v. Wilson*, 343 U.S. 495, 502 (1952).

Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983). CMUFSD has created such a forum by making its facilities available to a broad array of outside users and uses. Pet. Br. § I(A)(1).

Both CMUFSD and the New York AG spend considerable ink in an effort to minimize the breadth of public access to CMUFSD facilities. Ultimately, however, respondents each concede, as they must, that the school facilities at issue constitute "designated public forum" property for purposes of the First Amendment right to free speech. CMUFSD Br. at 22; Brief for Respondent Attorney General (hereafter, "NYAG Br.") at 12-13.

The record in this case admits of no other conclusion. Pet. Br. at 4-6, 18-19.

A. CMUFSD Practice

CMUFSD claims that its practice has been to allow only selective, limited access to school facilities. The record of the case, however, is completely to the contrary. *See* Pet. Br. at 4-6. Petitioners' trial exhibits, which reflect only a *partial* listing of school uses, reveal that from 1987 to 1990 there were over 955 uses of school facilities by at least 80 different groups. (J.A. 27-69, 100-09, 139-48).[2] The only use applications that CMUFSD ever denied were those of petitioners. Pet. Br. at 8. As in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), the school district's creation of a forum for speech "should be triggered by what a school *does*, not by what it *says*." *Id.* at 244 (emphasis added) (internal quotation marks and citation omitted).

The breadth of access CMUFSD has permitted in this case would clearly establish the creation of a designated

[2] Contrary to CMUFSD's unsupported assertion, CMUFSD Br. at 3, the list of groups, activities, and topics contained in petitioners' main brief is by no means an "exhaustive" listing of "the" only users and uses. *See generally* J.A. 25-69, 93-179 (partial listing of uses).

public forum even if none of the other uses had happened to address the precise topic—family issues—which Lamb's Chapel wished to address. But in fact CMUFSD has granted access to a variety of organizations engaged in expression concerning precisely the same topics which Lamb's Chapel would have addressed in the film "*Turn Your Hearts Toward Home.*"

—*Family Counseling Service* (FCS)—FCS, a division of the Hampton Council of Churches (J.A. 172; Tr. 29), regularly utilized CMUFSD facilities for counseling services, for advisory board meetings, and for fundraising (Tr. 33-34; J.A. 132, 133, 155, 172). FCS sponsored concerts at CMUFSD school facilities in order to "promote awareness of the family counseling services of the Hampton Council of Churches" (J.A. 93).

The services FCS offered included counseling and group meetings dealing with "Parent/Child Problems," "Substance Abuse," and "Marital Problems." Plaintiffs' Ex. 23 (attached as Appendix A). Lamb's Chapel's film presentation would have dealt with the same issues: "battlegrounds in child-rearing," the difficulty of "childhood with an alcoholic father," and "conflict in marriage" (J.A. 87).

—*C.M.P.T.A.*—The Center Moriches PTA met on CMUFSD premises to address such topics as "Getting in touch with children's feelings" (J.A. 128). Lamb's Chapel's film addressed the comparable topics of "child-rearing" and "allowing children to grow to develop as individuals" (J.A. 87). The CMPTA addressed controversial current issues such as AIDS (J.A. 120); Lamb's Chapel's film would have touched upon the impact of abortion and pornography (J.A. 87).

—*H.E.L.P.* (Helping Every Living Person)—This "community minded non-profit organization" met at CMUFSD facilities to determine "how we can help needy families in our communities" (J.A. 123). Lamb's Chapel's film series likewise dealt specifically with ways to build

"happy, healthy, strengthened homes and family relationships in the years to come" (J.A. 88).

—*SEPTA* (Special Education PTA)—SEPTA, an organization targeting the parents of special education students (J.A. 127), has used CMUFSD premises for "support group" meetings (J.A. 104, 127) and for addressing such topics as "stress management for parents," Plaintiffs' Ex. 22. Lamb's Chapel's film likewise sought to offer parents "many practical helps" and to help them "free themselves of undeserved guilt" (J.A. 87).

In short, the undisputed record establishes not only that CMUFSD opened its school facilities to a multitude of uses and users, but that CMUFSD specifically permitted a variety of other groups to address the very topics Lamb's Chapel wished to address.[3]

B. CMUFSD Policy

The official CMUFSD policy implements the broad authorization of community access under state law. *See* Rules & Regs. (Pet. App. 59a): "These regulations have

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[3] CMUFSD claims that "petitioner's [sic] have apparently abandoned their argument . . . that certain events in the past indicated religious use." CMUFSD Br. at 22. Petitioners' argument to the district court and court of appeals on the existence of prior religious uses was tailored to the Second Circuit's peculiar rule that a designated public forum is not open to religious uses unless and until there are other, specifically *religious* uses. *See* Pet. Br. at 25-26 (discussing Second Circuit precedents). This Court has never embraced such a bizarre and unconstitutional rule; hence, arguing before this Court the question whether CMUFSD has allowed prior *specifically religious* uses would be beside the point. For the record, however, it remains true that CMUFSD has in fact permitted uses in the past that are arguably as religious as Lamb's Chapel's showing of a Dr. Dobson film. *See* Pet. Br. at 28 n.11 (Salvation Army Band concert with invocation and religious music; Gospel Music Concert with religious songs and hymns; parapsychology lecture including Hindu concepts and "spiritual effusion"). *See also* J.A. 159 (Moriches Choral Society rehearsal of "Messiah"); J.A. 133, 172 (family counseling services of Hampton Council of Churches).

been established in conformance with the intent as stated in Section 414 of the Education Law of the State of New York." As discussed in the following section, *infra* § I(C), this state law authorizes a wide spectrum of uses of school facilities. Furthermore, the CMUFSD policy explicitly contemplates "social, civic, or recreational use" of school facilities, Rules & Regs. #10 (Pet. App. 57a), as well as use by "political organizations," Rules & Regs. #8 (Pet. App. 57a). There is nothing in this official policy that would justify the conclusion that CMUFSD facilities are anything other than a designated public forum for free speech.

C. The State Education Statute

New York state law authorizes the use of public school facilities for, *inter alia*, "holding *social*, *civic*, and *recreational* meetings and entertainments, *and other uses pertaining to the welfare of the community.*" N.Y. Educ. Law § 414(1)(c) (Pet. App. 53a) (emphasis added). The terms employed in the New York statute are extremely broad:[4]

—"Social"—"enjoyed for the sake of companionship," Webster's Third New International Dictionary 2161 (1971) (definition 2a), "of or relating to human society," *id.* (definition 4a), or "of, relating to or concerned with the welfare of human beings as members of society," *id.* (definition 4b);

—"Civic"—"concerned with or contributory to general welfare and the betterment of life for the citizenry of the community or enhancement of its facilities; *esp*: devoted to improving health, education, safety, recreation, and morale of the general public through nonpolitical means," *id.* at 412 (definition 3);

[4] Interpretation of a statute begins of course, with the "common meaning" of the statutory language. *E.g.*, *Mergens*, 496 U.S. at 237 (citing dictionaries).

—"Recreational"—"of or relating to recreation," *id.* at 2161, while "recreation" means "refreshment of the strength and spirits after toil," *id.* (definition 1a), or "diversion or entertainment," *id.* (definition 1b);

—"Welfare"—"thriving or successful progress in life," *id.* at 2594 (definition 1a), "one's condition in regard to health, happiness, or prosperity," *id.* (definition 1b), and "the sum of individual utilities: a social optimum," *id.* (definition 1c).

The state attorney general errs by arguing that this extremely broad section provides only very limited authority for outside use of school facilities.

1. *Statutory construction*

The state AG first contends that this section must be viewed narrowly as a matter of statutory construction. According to this argument, the nine other subsections of § 414 would be meaningless if subsection 1(c) were in fact a broad grant of authority. NYAG Br. at 14-15.

This argument misses the mark. The other statutory subsections either clarify the legality of very specific uses or establish special restrictions or procedures for those particular uses. *See* § 414(1)(a)-(j) (Pet. App. 52a-54a).[5]

[5] Thus, subsection 1(a) clarifies that instruction in any branch of education, learning or arts is a permissible use; 1(b) specifically authorizes library uses; 1(c) authorizes "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community" while imposing a requirement of nonexclusivity and openness to the public; 1(d) provides special rules for events where admission is charged; 1(e) specifically authorizes the use of school facilities for elections and establishes procedures for permitting meetings sponsored by "political organizations"; 1(f) permits "civil forums and community centers," a specific type of activity which government officials "organize and conduct," and imposes certain procedures for such activities; 1(g) imposes special requirements for classes for mentally retarded minors; 1(h) clarifies that athletics is permitted; 1(i) specifically

There is no rule of statutory construction that forbids a legislature from clarifying the law for particular situations. Nor do *manner* restrictions (e.g., on charging fees or opening up meetings) negate in any way the breadth of access *per se* with respect to user identity or the subject matter of expression.

2. *Administrative interpretation*

The state AG next argues that official administrative interpretation of § 414 demonstrates the sharply limited nature of the uses authorized under that statute. NYAG Br. at 15-16. But the administrative appeals the state AG cites prove no such thing.

None of the rulings the AG cites embraces a narrow construction of the terms "social, civic, and recreational" or "pertaining to the welfare of the community" found in § 414(1)(c).[6] On the contrary, the AG cites administrative rulings which evidence a *broad* interpretation of § 414. *E.g.*, *Appeal of Erdberg*, 26 Educ. Dep't Rep. 464 (1987) (approving "flea market" on school grounds as use "pertaining to the welfare of the community" under § 414(1)(c)); *In re Appeal of Alcorn*, 24 Educ. Dep't Rep. 201 (1984) (approving "training sessions on nuclear plant safety" as use "pertaining to the welfare of the community" under § 414(1)(c)); *cf. In re Appeal of Weiss*, 19 Educ. Dep't Rep. 308, 310 (1979) (§ 414 no bar to private bus company's storage of school buses on school premises).

While one ruling suggests that the exclusion of religious activities from New York school premises is a policy of long standing, *see In re Appeal of Kennedy*, 2 State Dep't Rep. 625 (Educ. Dep't 1914), this can prove no more than that New York has a history of discrimination against religious uses. Such a history would be no more self-justifying than a similar history of racial discrimination or gender bias. Invidious discrimination cannot acquire constitutional tenure.[7]

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authorizes child care services and imposes certain requirements; 1(j) imposes a restriction on graduation exercises of not-for-profit schools.

A given activity may be simultaneously subject to restrictions found in more than one provision—for example, a meeting sponsored by the local Democractic party at which admission is charged, *see* § 414(1)(d), (e) (Pet. App. 53a). Other activities could fit simultaneously into two different categories (e.g., dance classes could be either "instruction in the arts," § 414(1)(a) (Pet. App. 52a), or "recreational meetings," § 414(1)(c) (Pet. App. 53a)). Neither of these presumably ordinary scenarios compels the conclusion that portions of the statute are therefore superfluous.

[6] Most of these administrative rulings are inapposite to the present case. These rulings address such issues as the improper use of admission fees for events held on school premises, *e.g.*, *In re Use of School-house in District No. 4*, 5 State Dep't Rep. 618 (Educ. Dep't 1915) (alleged illegal use of entertainment proceeds); *In re Appeal and Proceeding in Relation to Use of School Building*, 41 State Dep't Rep. 423 (Educ. Dep't 1931) (same); *In re Appeal from Action of Trustees of District No. 1*, 31 State Dep't Rep. 447 (Educ. Dep't 1924) (alleged illegal use of proceeds from public dance); *In re Appeal of Smith*, 15 Educ. Dep't Rep. 491 (1976) (same), or the unauthorized leasing of school premises, *In re Appeal of Palmiter*, 64 State Dep't Rep. 222 (Educ. Dep't 1942) (alleged illegal lease agreement with electric association); *In re Appeal of Steflovich*, 7 Educ. Dep't Rep. 76 (1967) (alleged illegal lease agreement with college), or the failure to observe statutory procedural requirements, *In re Appeal of Gaskin*, 1 Educ. Dep't Rep. 673 (1961) (political meeting held without prior vote of the district).

In re Appeal of Brett, 5 Educ. Dep't 54 (1965), was a case of discrimination on the basis of speaker *identity*, not subject matter. The ruling denied access to a teacher labor union while permitting access for professional teachers associations. *In re Appeal of Board of Educ.*, 21 Educ. Dep't Rep. 585 (1982), barred *commercial* use of school facilities. *In re Scanio*, 22 Educ. Dep't Rep. 315 (1982), did not reach the merits of a challenge to PTA use of school resources to lobby for a district budget. *In re Appeal of Rathjen*, 22 Educ. Dep't Rep. 595 (1983), barring a local resident from distributing religious literature to students on school grounds, did not involve meetings on school premises during non-school hours.

[7] Some of the rulings the state AG cites serve only to confirm that administrative rulings do not necessarily adhere to constitutional principles. *E.g.*, *In re Appeal of American Civil Liberties*

The state AG acknowledges, furthermore, that the legislative history of § 414 evinces an intent to provide broad access to school facilities. NYAG Br. at 3. *See* Ninth Annual Report of the Education Department 40 (Feb. 3, 1913) (while noting the exclusion of "religious purposes," report recognizes "a broad policy in determining the uses to which [school] buildings may be given").

3. *Comparison with other access policies*

The state AG persists, arguing that the breadth of access authorized under § 414 is, if nothing else, at least significantly narrower than the policies at issue in other equal access cases. NYAG Br. at 20-21. This is simply not so.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court held that a university had created a designated public forum for student groups, and that as a consequence the university could not censor out student religious groups. The Eighth Circuit described the policy at issue in *Widmar* as authorizing "political, cultural, educational, social and recreational events"[8]—precisely the range of activities permitted under § 414. *See* § 414(1)(e) (Pet. App. 53a) ("political meetings"); § 414(1)(c) (Pet. App. 53a) ("social, civic, and recreational meetings and entertainments, and other uses pertaining to the welfare of the community"); § 414(1)(a) (Pet. App. 52a) ("instruction in any branch of education, learning or the arts").

Other cases sustaining a First Amendment right to equal access involved policies of comparable or even narrower scope than § 414. *E.g., Concerned Women for America v.*

Union, 36 State Dep't Rep. 87, 100 (Educ. Dep't 1926) (approving exclusion of ACLU meeting on basis of probability of public resentment); *In re Appeal of Ellis*, 77 State Dep't Rep. 32 (Educ. Dep't 1956) (approving exclusion of group that advertised in Communist newspaper on basis of anticipated public dissension). The state AG does not purport to defend these rulings under the First Amendment.

[8] *Chess v. Widmar*, 635 F.2d 1310, 1312 (8th Cir. 1980).

Lafayette County, 883 F.2d 32, 33 (5th Cir. 1989) ("open for use of groups or organizations of a civic, cultural or educational character, but not for social gatherings, entertaining, dramatic productions, money-raising, or commercial purposes [or for] meetings for social, political, partisan or religious purposes"); *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1373 (3d Cir.) ("civic, cultural and service organizations," "labor unions," for-profit "plays" and "musical performances," and adult education or college classes), *cert. denied*, 111 S. Ct. 253 (1990); *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. # 5*, 941 F.2d 45 (1st Cir. 1991) (youth groups, community civic and service organizations, government agencies, educational programs, athletic or recreational activities, and cultural events).[9] The state AG's attempts to distinguish these policies fail:

—The state AG points out that in other cases the school districts "had never refused access to any group other than religious organizations." NYAG Br. at 20 (footnote omitted); *id.* at 21. But the same is true here: CMUFSD has not denied access to any group other than Lamb's Chapel.

—The state AG points out that in other cases the school districts had allowed "a wide range of uses," *id.* at 21. But the same is true here, Pet. Br. at 4-6, as the school district concedes, CMUFSD Br. at 22.

—The state AG points out that in other cases the school districts had allowed access on a first-come, first-served basis. NYAG Br. at 21. But the same is true here. Tr. 67 (testimony of CMUFSD business manager), 131 (testimony of CMUFSD superintendent).

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[9] The school policy in *Grace Bible* may be found in the Brief of Appellees at 9-10, *Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. #5*, No. 90-2124 (1st Cir. Mar. 15, 1991). The pertinent sections of the policy are reproduced as Appendix B to the present brief.

The conclusion is inescapable that § 414 authorizes, and CMUFSD has created, a designated public forum for free speech.

II. CMUFSD'S CENSORSHIP OF RELIGIOUS SPEECH FROM A DESIGNATED PUBLIC FORUM IS UNCONSTITUTIONAL.

Had Lamb's Chapel sought to address contemporary family concerns *without* any references to a religious perspective, CMUFSD would clearly have had no objections to use of its facilities. *See supra* § I(A). But because the film series Lamb's Chapel wished to show included a religious point of view, CMUFSD refused access to its facilities. CMUFSD Br. at 1-2. This is blatant government censorship of private religious speech. Pet. Br. §§ I, II.

The content-based exclusion of an otherwise eligible speaker from a designated public forum triggers strict scrutiny; i.e., that exclusion is unconstitutional unless narrowly tailored to further a compelling government interest. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981) (citation omitted). CMUFSD's antireligious censorship fails to survive this rigorous test. Pet. Br. § I(A)(3).

Respondents offer three principal arguments against this conclusion: first, that Lamb's Chapel is not an eligible speaker; second, that the Establishment Clause requires CMUFSD to exclude Lamb's Chapel; and third, that public policy considerations weigh in favor of excluding Lamb's Chapel.

None of these arguments can survive analysis.

A. Lamb's Chapel Was Eligible to Use the Forum to Show a Film on Family Issues.

Lamb's Chapel was clearly eligible to use CMUFSD facilities for civic, social, and recreational purposes, including the specific purpose of addressing contemporary family problems. Pet. Br. at 23-24; *supra* § I(A). Respondents have identified no legitimate basis for holding Lamb's Chapel to be outside of the scope of uses for which CMUFSD has opened its facilities. CMUFSD nevertheless claims that Lamb's Chapel "is not an eligible speaker" and that CMUFSD excluded Lamb's Chapel "on the basis of the speaker's identity and the subject matter of the[] speech," CMUFSD Br. at 23, 25; *id.* at 19. This claim is dishonest.

This Court has recognized the common-sense principle that government may designate a public forum while limiting that forum according to certain *neutral, legitimate* criteria. For example, government may open a forum limited to certain *media* of expression (such as drama, *see Southeastern Promotions Ltd. v. Conrad*, 429 U.S. 167 (1976)), or certain *classes of speakers* (such as students, *see Widmar*, official bargaining representatives, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), or "direct services" providers, *see Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985)), or even certain *subject matter* (such as school board business, *see Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976)). But when government strays from neutral *regulations* on speaker status, subject matter, or manner of speech, and instead begins *censoring* the content or viewpoint of otherwise eligible speakers and speech, this violates the First Amendment. *E.g., Widmar* (unconstitutional to ban religious speech by otherwise eligible speakers); *see generally Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 573-76 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

In the present case, CMUFSD relied upon no neutral, legitimate criteria in forbidding Lamb's Chapel to show a film on contemporary family issues. Instead, CMUFSD banned the film presentation because CMUFSD deemed the film "church-related" in its content and viewpoint. Pet. Br. at 7-8, 23-24.

1. *Identity of user*

CMUFSD concedes that it excluded the film presentation because of its "religious perspective," CMUFSD Br. at 2. Despite this concession, however, CMUFSD attempts to redefine the nature of its discriminatory act by means of semantic sleight-of-hand. CMUFSD claims that Lamb's Chapel is ineligible "as a religious *entity with a religious purpose*," CMUFSD Br. at 19 (emphasis added). But the only significant consideration for CMUFSD was the religious "purpose" of Lamb's Chapel's proposed activity (J.A. 81, 84, 92). CMUFSD does not exclude religious entities *per se*, *see* Pet. Br. at 23-24; nor has CMUFSD claimed that it would permit *nonreligious* entities to use school facilities for religious purposes. Thus, CMUFSD's claim to exclude Lamb's Chapel "as a religious *entity* with a religious purpose" is highly misleading. CMUFSD excluded Lamb's Chapel not because of what Lamb's Chapel *is* (a church), but because of what Lamb's Chapel wanted to say. CMUFSD has already admitted as much. CMUFSD Br. at 1-2.

2. *"Purpose" of use*

Both CMUFSD and the state AG defend the exclusion of Lamb's Chapel as discrimination based on the religious "purpose" of the speech. CMUFSD Br. at 15-17, 19; NYAG Br. at 4-5, 22. This is not a constitutionally permissible criteria.

First of all, to the extent CMUFSD would disallow equal access to its facilities based upon a speaker's *subjective* purpose, CMUFSD strikes at the most sacrosanct core of the First Amendment: freedom of thought and belief. "The freedom to hold religious beliefs and opinions is absolute." *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). Hence, "government may not . . . impose special disabilities on the basis of religious views or religious status," *Employment Div v. Smith*, 494 U.S. 872, 877 (1990) (citations omitted), and any attempt by CMUFSD to do so would be anathema to the Constitution.

Second, to the extent CMUFSD would deny Lamb's Chapel access based upon the *objective* purpose of the intended activity, CMUFSD's rationale is a thinly-veiled disguise for antireligious discrimination. Lamb's Chapel's *objective* purpose was to make a public presentation on contemporary family issues. CMUFSD has not excluded *that* purpose; on the contrary, CMUFSD has permitted other groups to engage in expression addressing identical subject matter. *Supra* § I(A); Pet. Br. at 23-24. Instead, CMUFSD excluded Lamb's Chapel because of the *viewpoint* that use reflected. *See* CMUFSD Br. at 1 (describing Lamb's Chapel's "purpose" as showing a film advocating "the Christian approach" to family values). Viewpoint discrimination is unconstitutional even in a nonpublic forum, *Cornelius*, 473 U.S. at 806; Pet. Br. at 29-31, and thus cannot serve as a legitimate criterion for limiting a forum.

3. *Public/private distinction*

The state AG asserts that the forum CMUFSD created is in fact limited to "community purposes" and that religion does not serve the community. NYAG Br. at 24. This argument is, frankly, astonishing for its depth of antireligious bigotry.

According to the state AG, it is "fundamentally reasonable" to permit access to CMUFSD property " 'only where it serves the interest of the *public in general*, rather than that of *sectarian groups*,' " NYAG Br. at 24 (quoting *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 680 (2d Cir. 1988)). The AG claims that "[r]eligious advocacy . . . serves the community only in the eyes of its adherents and yields a benefit only to those who already believe." NYAG Br. at 24. In other words, bringing a religious point of view to bear on public issues does not benefit the public.

One might expect to find such an argument in the former *Pravda* or the newsletter of a particularly in-

tolerant organization of atheists. But that a state attorney general would demonstrate such deep-seated disdain for religion is truly disheartening: "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Mergens*, 496 U.S. at 248 (plurality) (internal quotation marks and citation omitted).

Must petitioners rehearse for the state AG the innumerable ways in which Judeo-Christian values have exerted a civilizing force on society throughout the ages? Must petitioners catalogue the countless contributions of a religious perspective to art, architecture, music, and literature? Must petitioners document the many statements of the Founding Fathers emphasizing not only the value but the *necessity* of religious beliefs to the success of the American experiment? Does the AG truly believe that because a believer's faith is "inviolately private," NYAG Br. at 24, it is also unfit for public communication?

Suffice it to say that the state AG's antipathy to the expression of the religious points of view of private speakers is entirely and fundamentally incompatible with the Free Exercise and Free Speech guarantees of the First Amendment.[10]

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[10] The state AG's argument is logically fallacious as well. If Lamb's Chapel's presentation of a religious perspective on contemporary family issues can be said to benefit only a portion of the community, then the presentation or advocacy of *secular* ideas or perspectives, whether those of the local humane society, the local property owners' association, or the local music society, can likewise be said to serve only a portion of the community. The state AG does not explain why, for example, advocacy of one's personal views on the proper treatment of animals is of benefit to the community if based on philosophy or emotions but not if based on one's religious beliefs.

B. The Establishment Clause Raises No Bar to Equal Access.

CMUFSD argues that the Establishment Clause requires CMUFSD to deny equal access to those private parties who engage in religious speech or activities. CMUFSD Br. at 27-30. The state AG, by contrast, avoids this meritless argument and concedes the constitutionality of an equal access policy. NYAG Br. at 10. As discussed in petitioners' opening brief, this Court has already definitively ruled that the Establishment Clause presents no bar to a policy of equal access to public school facilities. *See* Pet. Br. at 21; *Widmar*, 454 U.S. at 270-76; *Mergens*, 496 U.S. at 247-53 (plurality), 260-62 (concurrence). There should be no need to repeat the obvious: "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (plurality) (emphasis in original).[11]

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[11] CMUFSD makes the curious argument that *if* Lamb's Chapel were the only religious entity to use school facilities, *then* some people might think that CMUFSD endorsed Lamb's Chapel and its beliefs. CMUFSD Br. at 28. This is not only silly but irrelevant. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality). Furthermore, contrary to CMUFSD's assertion, government has no affirmative duty to make sure that many different denominations actually use its facilities. *Cf.* CMUFSD Br. at 29 ("government . . . would need to monitor how often the people of a particular faith used the school buildings"). The First Amendment protects equal *access* to public fora, not equal *frequency* of use.

CMUFSD also posits that equal access would give Lamb's Chapel a "benefit from state financial support in the form of rent-free facilities, heat, lighting, and other connected expenses." CMUFSD Br. at 30. This is likewise irrelevant. The even-handed provision of basic government services, with or without special user fees, has never been held to violate the Establishment Clause. *Widmar*, 454 U.S. at 273; *Mergens*, 496 U.S. at 248 (plurality); *id.* at 260 (concurrence). *See Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (approving provision to church schools of benefits of "such

C. Public Policy Considerations Do Not Negate the Right to Equal Access.

CMUFSD asserts that it must remain free to exclude religious speech from its facilities in order to prevent the offense and unrest that may result from the activities of "radical" groups. CMUFSD Br. at 4-5, 11-13, 23-24. Not surprisingly, CMUFSD cites no authority whatsoever for this "public policy" argument. This argument is completely meritless, for a number of rather basic reasons.

First, "public policy" considerations cannot trump constitutional rights. The right to free speech, like the right to the free exercise of religion or the right to freedom from unreasonable searches and seizures, does not depend upon an assessment of the public utility of the exercise of that right. *See West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

Second, the mere "fear of . . . possibilities," CMUFSD Br. at 24, cannot justify censorship of speech: "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969).

Third, the disagreement, resentment, or hostility of others cannot justify the suppression of speech. *United States v. Eichman*, 496 U.S. 310, 318-19 (1990); *Texas v. Johnson*, 491 U.S. 397, 408-09, 414 (1989).

Fourth, concern with "radical" groups simply has no logical connection with a ban on *religious* speech. Nonsectarian groups are quite as capable of being "radical"

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general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks"). In fact, the discriminatory *denial* of such services would "handicap" religions in violation of the Establishment Clause. *Everson*, 330 U.S. at 18; *Mergens*, 496 U.S. at 248 (plurality). *Accord Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) (imposition of "special disabilities" on believers violates Free Exercise Clause).

as any religious sect. Indeed, the two groups CMUFSD professes to fear—"the Neo-Nazi party and the Ku Klux Klan," CMUFSD Br. at 12—are not even excluded by the school district's ban on religious uses. This argument is therefore strictly a red herring.

III. CMUFSD'S ANTIRELIGIOUS CENSORSHIP VIOLATES THE ESTABLISHMENT CLAUSE.

This Court has frequently declared that the Establishment Clause requires government *neutrality* and forbids government *hostility* toward religion. In the present case, CMUFSD has plainly breached this constitutional norm. Pet. Br. § III.

The state AG asserts that the Establishment Clause does not protect religion against hostile government action, NYAG Br. at 32-33; such protection, the AG claims, is the exclusive province of the Free Exercise Clause, *id.* This Court's precedents are decisively to the contrary.

In *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), this Court held that government action violates the Establishment Clause if "the principal or primary effect" of that action "inhibits religion." In *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (and cases cited), this Court reaffirmed that the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *See also Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) ("the government must pursue a course of complete neutrality toward religion") (and cases cited); *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (Establishment Clause forbids use of government power to "handicap" religion). This Court has specifically reiterated this principle in the context of equal access to school facilities. *Mergens*, 496 U.S. at 248, 253 (plurality); *Widmar*, 454 U.S. at 271, 272 n.11.[12]

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[12] Contrary to the state AG's assertion, NYAG Br. at 35 n.26, petitioners do not rest their Establishment Clause argument exclusively on the "entanglement" prong of *Lemon*. Petitioners' addi-

Perhaps the state AG believes that in these and many other cases, the Court was simply jesting. Lamb's Chapel, however, takes these declarations seriously.

CMUFSD has embraced an explicit policy of discrimination against religious speech. Both CMUFSD and the state AG argue that the suppression of private religious speakers advances the public good. This Court cannot countenance such intolerance. If ever a case were to present this Court with an instance of antireligious hostility in violation of the Establishment Clause, this is that case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the opening Brief for Petitioners, this Court should reverse the judgment of the Second Circuit.

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tional "hostility" argument, Pet. Br. at 36, fits squarely under the "primary effect" prong of *Lemon*, as the authorities quoted in the text demonstrate. Of course, the constitutional ban on government hostility toward religion, like the ban on excessive entanglement, predates the *Lemon* test.

APPENDICES

APPENDIX A

PLAINTIFFS' EXHIBIT 23

THE FAMILY COUNSELING SERVICE

[LOGO]

Established 1971

A NON-SECTARIAN FAMILY SERVICE AGENCY

Serving the east end of Long Island

MAIN OFFICE:
THE BEINECKE BUILDING
Post Office Box 944
Main Street and Potunk Lane
Westhampton Beach, N.Y. 11978
Telephone: 516-288-1954

WHAT is the Family Counseling Service?

It is a non-profit, non-sectarian, agency serving Eastern Long Island. The agency is a place where individuals and families seek professional help in many areas including . . .

- Child Abuse
- Substance Abuse
- Domestic Violence
- Parent/Child Problems
- Elder Abuse
- Bereavement/Grief Counseling
- Life Transition Counseling
- Marital Problems

WHAT are the qualifications of the staff?

The staff is comprised of professionals with graduate training in social work, counseling, psychiatry, psychology, and other recognized disciplines.

[Map of Locations Omitted in Printing]

WHO uses the Family Counseling Service?

Over 4,500 individuals each year use this agency. Families, parents, children, adolescents, and the elderly are all offered services.

WHAT services are offered?

- Counseling individuals, couples, and families.
- Group counseling.

- Community awareness and education programs to clubs, religious groups, schools, parent organizations, etc.
- Training workshops and seminars for professionals and para-professionals.
- In-school prevention/education programs.
- Psychiatric consultation available to on-going clientele.
- Youth employment service.
- Prevention and education programs for the community at large.
- Resource and referral services.

WHAT happens when a person goes to the agency for counseling?

During an initial interview, a counselor will explore the problem with the client and together assess the need for treatment and other on-going services.

HOW does one seek service, request a presentation, or make an appointment?

Call the central office at: 516-288-1954

FEES for service

There is an initial assessment fee. Ongoing fees are based on a sliding scale according to one's ability to pay. Fees are waived for youth services.

THE SERVICE IS AVAILABLE TO ANYONE, REGARDLESS OF RELIGION, RACE OR THE ABILITY TO PAY.

. . . With service centers throughout eastern Suffolk working with hospitals, shelters, schools, colleges, agencies, churches and synagogues.

1. FAMILY COUNSELING OFFICES
2. HOSPITALS

3. SHELTERS
4. SCHOOLS
5. COLLEGES
6. CHURCHES & SYNAGOGUES
7. AGENCIES

SPECIALIZED SERVICES:

SUBSTANCE ABUSE—Prevention Programs and Training Seminars; Drug-free out-patient intervention and treatment services.

FAMILY VIOLENCE—Prevention, education, awareness and training programs dealing with domestic violence and child abuse. Intervention and treatment services include therapy for children, a Parents Anonymous Program, and individual therapy for adult victims of domestic violence.

LIFE TRANSITION/BEREAVEMENT CENTER—Offers assistance to those who are coping with life transitions, death, and other issues of personal loss.

YOUTH—Personal development programs enhance self-awareness and decision-making skills; counseling and support groups; and Youth Employment Service.

VOLUNTEERS

A multi-service family agency could not exist without the support of dedicated volunteers. Will you help us by offering your time and talent for the Benefit Committee, a Community Advisory Board, the Youth Employment Service, or the community out-reach programs? Call or write to us to be part of our life-enriching programs.

DONATIONS APPRECIATED

The Family Counseling Service of the Hampton Council of Churches, Inc. provides services to the community

through the support of institutions, foundations, community service organizations, and individual donors who supplement funding from the United Way of Long Island and government contracts.

The Service is partially funded by the Suffolk County Youth Bureau, the Brookhaven Youth Bureau, Southampton Town, New York State and Suffolk County Departments of Social Services and Substance Abuse Services.

Even with this, we still incur deficits. Any donation to the Family Counseling Service is greatly appreciated and is tax deductible. Checks made payable to: "The Hampton Council of Churches, Inc.-F.C.S." may be left at the office or mailed to: P.O. Box 944, Westhampton Beach, New York 11978

THE FAMILY COUNSELING SERVICE

John F. Petitt, Esq., *Chairman*
George W. Busler, S.T.M., *Executive Director*
Lucille Buergers, A.C.S.W., *Supervisor*
Lionel G. Deutsch, M.D., *Phychiatric Consultant*

[SEAL] A United Way Member Agency

APPENDIX B

ACCESS POLICY OF MAINE SCHOOL AREA DISTRICT #5

The MSAD #5 Board of Directors recognizes its responsibility to provide a sound education for all students regardless of race, gender, religion or national origin and to maintain neutrality and pluralistic tolerance in a demographically diverse school district. Therefore, facility use shall be limited to organizations and activities compatible to the mission and function of the school district within the community.

Facilities Use Rules

****

B. Non-School Organizations and Activities

The following shall be permitted use of school facilities, and may apply for use of those facilities. Access by outside groups shall be subject to approval based upon availability, fees, insurance coverage, staffing, and safety regulations, as provided elsewhere in the School District's policies and regulations.

(1) *Youth Group*; Youth groups shall be defined as groups made up primarily of MSAD #5 citizens 18 years of age or under. (e.g. Girl Scouts, Boy Scouts, Cub Scouts, Brownies, etc.)

(2) *Community Civic and Service Organizations*; Community Civic and Service Organizations shall be defined as any public or private nonprofit corporation which provides a service program, or programs at the community level. (e.g. the Jaycees, Lions and Rotary clubs, etc.)

(3) *Governmental Agencies*; Governmental agencies shall be defined as a department or agency of State of Maine and/or the City of Rockland, the Towns of Owls

Head and South Thomaston, or other agencies that receive public funds. (e.g. the Zoning Board of Appeals and the Shellfish Commission, etc.)

(4) *Youth or Adult Educational Programs;* Youth or Adult Educational Programs shall be defined as educational programs sponsored and conducted by MSAD #5 or the Adult Education and Community Recreation Programs.

(5) *Athletic or Recreational Activities*; (Basketball leagues, track and field meets, etc.)

(6) *Cultural Events*; (Concerts, films or plays, etc.)

Supreme Court, U.S.
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No. 91-2024

In the Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL, ET AL., PETITIONERS

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether a public school district may constitutionally bar a local group from using school facilities, on the same basis as other members of the public, solely because their otherwise permissible proposed use evinces a religious point of view.

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INTEREST OF THE UNITED STATES

This case presents the question whether a public entity may exclude particular speech from a forum that it has opened at least partially for public expression, solely on the basis of the speech's religious point of view. The United States is the proprietor of numerous non-public and "designated" or "limited" public forums, and accordingly has an interest in the outcome of this case. The United States has participated, as a party or amicus curiae, in numerous cases involving similar issues, including *United States* v. *Kokinda*, 110 S. Ct. 3115 (1990); *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); and *United States Postal Service* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981).

This case also raises issues under the Establishment Clause of the First Amendment, in particular the proper accommodation of religious speech in the context of public property. The United States has a significant interest in these issues as well, both generally and as the proprietor of public property, including public schools. See, *e.g.*, 10 U.S.C. 7204 (schools for Navy dependents); 22 U.S.C. 2701 (foreign service dependents); 25 U.S.C. 271-304b (Native Americans). The United States has participated in numerous cases involving the Establishment Clause, including most recently *Lee* v. *Weisman*, 112 S. Ct. 2649 (1992) (public school graduation ceremony), and *Westside Community Bd. of Educ.* v. *Mergens*, 496 U.S. 226 (1990) (statutory policy of equal access for religious speech).

STATEMENT

Section 414 of the New York Education Law provides that local school districts may make property under their control available during non-school hours for various specified activities. These include "holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public." N.Y. Educ. Law 414(c) (McKinney 1988). Section 414 itself places no limitation on otherwise permissible social, civic, recreational or community welfare uses of school property based on the religious content of a particular proposed activity.[1]

[1] Section 414 by its terms imposes restrictions on religious organizations or activities in only two specific and limited contexts. Section 414(d) provides that admission may not be charged for "meetings, entertainments and occasions" on school property if such activities "are under the *exclusive* control, *and* the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or exclusive society • • • " (emphasis added). Section 414(j), added in 1991, permits use of public school facilities for "graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed."

A New York appellate court ruled in 1978, however, that a local school board had no authority under Section 414 to allow student "bible clubs" to meet on school property, because "[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414." *Trietley* v. *Board of Education*, 409 N.Y.S.2d 912, 915 (App. Div. 1978). The Second Circuit has accepted, as an authoritative interpretation of state law, *Trietley*'s holding that Section 414 excludes religious uses of school property, see *Deeper Life Christian Fellowship, Inc.* v. *Sobol*, 948 F.2d 79, 83-84 (1991), and the Attorney General of New York advances the *Trietley* analysis in this proceeding. See N.Y. Att'y Gen. Br. in Opp. 2-4, 10-13.[2]

Respondent Center Moriches Union Free School District (CMSD) has implemented Section 414 through local rules and regulations. Pet. App. 56a-59a. Most of the local rules are procedural (*e.g.*, Rule 1 (application forms), Rules 18-19 (permit must be signed by administrator and exhibited upon request)) or prescribe neutral restrictions unrelated to the purpose or content of the proposed activity (*e.g.*, Rule 4 (restrictions on refreshments), Rule 6 (insurance requirements), Rule 17 (smoking)).

[2] We note that since 1984 the federal Equal Access Act, 20 U.S.C. 4071, would likely dictate a different result on the facts of *Trietley* (perhaps with slight modifications in the planned operation of the proposed bible clubs). See *Westside Community Bd. of Educ.* v. *Mergens*, 496 U.S. 226 (1990). In particular, the New York court's discussion of the Establishment Clause, 409 N.Y.S.2d at 916-917, could not stand after *Mergens*.

Several rules do, however, regulate in one way or another the "content" of permitted events. Rule 10, for example, provides a more specific gloss on the term "general public" as used in Section 414(c).[3] Other rules reflect Section 414's limits on political events (Rule 8)[4] and events where admission is charged (Rule 11), and prohibit use for "personal or private gain" (Rule 9) or for events involving gambling or the consumption of "intoxicating beverages" (Rule 3). Finally, Rule 7 makes explicit the restriction that respondents contend is implicit in the state statute: "The school premises shall not be used by any group for religious purposes."

Under Section 414 and its local rules, CMSD has opened its facilities to a wide variety of community uses. From 1987 through 1990, for example, groups receiving permits included the Southern Harmonize Gospel Singers; the Salvation Army Youth Band; the Moriches Bay Power Squadron; the Unkechaug Dance Group; the Holiday Beach Property Owners Association; and the Girl, Boy and Cub Scouts. During the same period, CMSD issued permits for, among other activities, a concert sponsored by the Hampton Council of Churches/Family Counseling Services; the Center Moriches Co-op Nursery School Quilting Bee; the Moriches Pa-Qua-Tuck Squaws' Chinese Auction; the Chamber of Commerce's Town Fair Day

[3] Rule 10 provides that "[a] permit for social, civic, or recreational use shall be approved only if it can be non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event."

[4] Section 414(e) provides that facilities may be made available for "polling places • • • and registration of voters and for holding political meetings," but that "no meetings sponsored by political organizations shall be permitted unless authorized" by a local board or district meeting. Local Rule 8 merely provides that "use of the premises by political organizations must be secured in compliance with Section 414." See n. 9, *infra*.

(and its Annual Duck Race); the Center Moriches Music Award Association's presentation of "Amahl & the Night Visitors"; the Brookhaven Kennel Club's dog obedience and "breed handling" classes; and a lecture series, sponsored by the local public library, that featured a psychotherapist speaking on "parapsychology and transpersonal psychology and [dealing] with eastern mysticism and metaphysics."[5] See Pet. App. 19a-20a nn.4-5; Pet. 4-5.

Petitioner Lamb's Chapel is an evangelical Christian church located in the community of Center Moriches, New York, and petitioner John Steigerwald is its pastor. Pet. App. 2a-3a. In 1988 and 1989, petitioners twice applied for a permit to use CMSD facilities to show a six-part film series featuring lectures by Dr. James Dobson[6] on child-rearing issues confronting modern parents. See Pet. App. 5a-6a; C.A. App. 348-359. According to a brochure provided to school officials, in the series "America's most trusted family life expert brings his vast experience to bear on one of society's most pressing challenges—the protecting and strengthening of family relationships." C.A. App. 354. Dr. Dobson "portrays the pressures today's parents are susceptible to," and reminds his audience of "the undermining influences of radio, television, films and the

[5] The district court recited testimony offered by petitioners that "the lecturer on parapsychology from the Mind Center • • • discussed, among other things, spiritual growth, channeling, out-of-body experiences, and kundalini and the centers of the body." Pet. App. 46a.

[6] The brochure for the film series that was provided to the school authorities, C.A. App. 353-356, describes Dr. Dobson as a licensed psychologist and former associate clinical professor of pediatrics at the University of Southern California, author of nine "best-selling" books, radio commentator, and president of Focus on the Family, "a non-profit corporation dedicated to the preservation of the home." *Id.* at 356.

press – which can only be counterbalanced by a loving home where Christian values are instilled from an early age." *Ibid.* Stressing a renewed commitment to the family, the brochure concludes that "the purpose of this powerful new film series [is] to challenge [concerned] individuals to return to the traditional values upon which families are best created and nurtured." *Ibid.*

The brochure briefly summarizes each of the series' six parts. C.A. App. 354. The first film, for example, "emphasizes how swiftly time passes and appeals to all parents to 'turn their hearts toward home' during the all-important child-rearing years." The second film, "Power in Parenting: The Young Child," is said to "offe[r] many practical helps for facing the battlegrounds in child-rearing – bedtime, mealtime and other confrontations so familiar to parents," as well as examining "areas of conflict in marriage and other adult relationships." The third film deals with teenage rebellion and "discusses father/daughter and mother/son relationships, and the importance of allowing children to grow and develop as individuals." The fourth film discusses the family and related public policy issues in the context of a modern "civil war of values," while the fifth features Dr. Dobson's wife recalling "a difficult childhood with her alcoholic father" and "the influences which brought her to a loving God." The concluding segment emphasizes "four traditional values which, if properly employed and defended, can assure happy, healthy, strengthened homes and family relationships." *Ibid.* Overall, petitioners described the series in their second permit application (C.A. App. 357-358) as a "family oriented movie from a Christian perspective." In that context, petitioners have never disputed that the series is "of a religious nature" and would be shown "for a religious purpose." Pet. App. 36a (district court opinion).

Petitioners' requests to use school facilities to show the Dobson lectures were denied because they "appear[ed] to be church related." C.A. App. 352, 359; Pet. App. 5a-6a. Petitioners challenged the denial in the district court as a violation of their rights under the Freedom of Speech and Assembly, Free Exercise, Establishment and Equal Protection Clauses. The district court granted summary judgment for CMSD, holding that CMSD had created a "limited public foru[m]" (Pet. App. 31a, 44a) by opening its facilities to various public uses, but that it had not allowed "organizations of similar character to Lamb's Chapel to use its facilities for religious purposes," and that therefore its denial of the permit on religious content grounds was "viewpoint-neutral and, hence, constitutional." *Id.* at 31a-32a.

The court of appeals affirmed. It agreed with the district court that CMSD had created a "limited public forum," Pet. App. 10a, that the school district could legitimately exclude "religious uses" from that forum, and that it had, in fact, consistently done so. *Id.* at 10a-14a. Because it was unable to identify "any prior use of [CMSD] facilities for purposes that are religious in any meaningful way," the court concluded that "the facilities were limited forums not opened to religious uses by policy or practice and that there was no constitutional violation in the failure of the School District to afford access" to petitioners. *Id.* at 14a.

SUMMARY OF ARGUMENT

We believe that this case is controlled by the reasoning and result in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). A governmental proprietor such as CMSD has broad discretion to restrict expressive activity in its facilities in ways reasonably related to their central purposes, including generally imposing restrictions on the types of speakers or

the subject matter of the speech to be allowed. Although the school district was under no constitutional obligation to afford the general public access to its facilities, however, it in fact adopted a policy of allowing wide access for "social, civic and recreational" events and "other uses pertaining to the welfare of the community." Having done so, it was required to provide equal access for petitioners' religious speech. The facts of this case do not distinguish it from *Widmar*, and we believe that decision compels judgment in favor of petitioners here.

Even if *Widmar* does not dictate the result, however, respondents' regulation must fail as applied in this case. Once a governmental proprietor has opened a forum to a general type of speech, such as lectures on matters of public concern, it may not, without particular justification of a sort not proffered here, exclude proposed speech of that type from the forum solely because it advances a religious point of view. CMSD's prohibition on the use of its facilities "for religious purposes," as applied to the lecture series at issue in this case, violates this basic principle.

ARGUMENT

I. THIS CASE IS CONTROLLED BY THE COURT'S PREVIOUS DECISION IN *WIDMAR* v. *VINCENT*

As this Court has repeatedly held, "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981). Rather, "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983).

In "traditional public forums," such as streets and parks, and in places that the government has itself opened for unrestricted expressive use by the general public, the government's ability to regulate speech is distinctly circumscribed and subject to strict constitutional scrutiny. See, *e.g.*, *Perry*, 460 U.S. at 45. The government may, on the other hand, severely restrict or even deny access to public facilities that are not traditional forums for expression and that the government has not opened for such use, "so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806.[7] See, *e.g.*, *Perry*, 460 U.S. at 46 (public school internal mail system); *Adderly* v. *Florida*, 385 U.S. 39 (1966) (prison); *Greer* v. *Spock*, 424 U.S. 828 (1976) (military base); *International Soc'y for Krishna Consciousness* v. *Lee*, 112 S. Ct. 2701 (1992) (airport).

The school auditorium at issue here is not a traditional public forum. See, *e.g.*, *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 267 (1988). This Court has made clear that a public entity may limit the speech that it chooses to permit in such an otherwise nonpublic forum to a relevant class of speakers, such as students on a university campus. See *Widmar* v. *Vincent*, 454 U.S. at 267-268 & n.5. Similarly, several cases have held or reiterated that

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[7] Cases interpreting the First Amendment often speak of a particular ground for regulation of speech as "content-neutral." See, *e.g.*, *United States* v. *Kokinda*, 110 S. Ct. 3115, 3124 (1990) (plurality opinion) (prohibition of solicitation). In the case of a limited public forum, however, it is necessary to distinguish between the exclusion of speech on "a topic not encompassed within the purpose of the forum," *Cornelius*, 473 U.S. at 806, a permissible form of "content" discrimination, and the impermissible exclusion of a particular "point of view," *ibid.* Like the Court in the quoted passage from *Cornelius*, we use the term "viewpoint neutral" to preserve that distinction.

under appropriate circumstances a governmental proprietor may limit the subject matter of speech to which it opens a particular forum. See *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985) (exclusion of "advocacy" groups from charitable fundraising campaign); *Perry*, 460 U.S. at 46 n.7, citing *City of Madison Joint Sch. Dist. No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 & n.8 (1976) (school board business); *Greer* v. *Spock*, *supra* (partisan political rallies and disruptive literature banned from military base although selected other events allowed for benefit of troops); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (political messages excluded from city streetcars although commercial advertising permitted). Cf. *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 133-136 (1977) (prison administrators could grant privileges to Jaycees and Alcoholics Anonymous not granted to illegal and adversarial prisoners' union).

To the extent that the government opens a forum, however, speech within its limits is entitled to the full measure of First Amendment protection. See, *e.g.*, *Krishna Consciousness*, 112 S. Ct. at 2705; *Perry*, 460 U.S. at 48 (limited forum extends to uses "similar [in] character" to those government has permitted). Thus, New York and CMSD have considerable discretion in managing their public property in ways consistent with its fundamental purposes.[8] If they choose to open their facilities to public speech largely unrelated to those purposes, however, the permissible scope of further regulation of that speech may be considerably narrowed.

[8] They could, for example, choose at any time to grant after-school access to public school facilities only to student groups or to groups of special interest to students, or only for public discussion of school-related business.

In fact, the State and the school district have by policy and practice permitted significant, non-school related public use of the district's facilities. State law authorizes use of school facilities for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," so long as such events are "non-exclusive and * * * open to the general public." N.Y. Educ. Law 414(c). Under this provision, CMSD has made its facilities available to a wide, although not wholly indiscriminate, variety of groups and uses. Indeed, the rules for the use of school facilities impose only three potentially significant restrictions on the otherwise nearly plenary category of social, civic, recreational, and community welfare uses: permitted events must not be "for personal or private gain," Local R. 9; they must not be "sponsored by political organizations" unless specially authorized, Local R. 8;[9] and they must not be "for religious purposes," Local R. 7.

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court struck down a state university's regulation barring use "for purposes of religious worship or religious teaching" of university facilities otherwise made widely available for use by student groups. See *id.* at 265. The Court found, without any extended discussion of the particular types of student groups involved or their specific non-religious activities, that by routinely allowing use of its facilities

[9] Section 414(e) of the Education Law and Local Rule 8 provide that "political organizations" may sponsor meetings in school facilities only if "authorized by a vote of a district meeting * * * or, in cities by the board of education thereof." The theoretical scope and practical application of this restriction are not apparent, from the face of the statute or from the record. To the extent that it is applied to exclude otherwise permissible activities because of the political viewpoint of their sponsors, it is constitutionally suspect for the same reasons that apply to the "religious purposes" rule at issue in this case.

for meetings of registered student organizations the university had "created a forum generally open for use by student groups." *Id.* at 267.[10] Because the "religious worship and discussion" excluded from the forum were "forms of speech and association protected by the First Amendment," the exclusion could be upheld only if the university could show that it was "necessary to serve a compelling state interest and * * * narrowly drawn to achieve that end." *Id.* at 269-270. Although it acknowledged that the university's asserted interest in complying with the requirements of the Establishment Clause was "compelling," the Court held that nothing in a policy of "equal access" for religious speech would offend that Clause. *Id.* at 271-275; see also *Westside Community Bd. of Educ.* v. *Mergens*, 496 U.S. 226 (1990).

The reasoning and result in *Widmar* compel a decision for petitioners in this case. As in *Widmar*, the school district here has opened its facilities to a wide variety of expressive activity. As in *Widmar*, it has excluded from those facilities any speech that it deems to be "for religious purposes." Local R. 7. As in *Widmar*, that exclusion is, at least as applied in this case, based on the viewpoint espoused by the excluded speaker. As in *Widmar*, any such exclusion requires constitutional justification by the government – although here, *unlike* in *Widmar*, the government has asserted no justification that is even

[10] The court noted that "a university differs in significant respects from public forums such as streets or parks or even municipal theaters," and disclaimed any implication that the First Amendment required the school to grant "free access" to all its facilities, or to make facilities equally available to both student and non-student groups. 454 U.S. at 267-268 n.5. In the context of the forum it had opened for student groups, however, the university was required to "justify its discriminations and exclusions under applicable constitutional norms." *Id.* at 267.

superficially plausible.[11] Thus here, as in *Widmar*, the exclusion must fail.

The court of appeals attempted to distinguish *Widmar* on the ground that it involved only student groups. Pet. App. 14a-15a. But that distinction is irrelevant. Although CMSD is certainly entitled to limit the use of its facilities to student groups, it has chosen instead to make them available, after school hours, to community groups. The question is therefore, as in *Widmar*, what type of speech – not what type of speaker – may be excluded from the forum that CMSD has itself created. Indeed, if anything, the fact that the speakers *and audience* involved here are not only students but also (and as to petitioners' proposed lecture series, primarily) adult members of the community should further alleviate at least one of the concerns addressed by the Court in *Widmar*: after-school use of school property by adults is presumably even less likely to imply any state control over or sponsorship of the views expressed by individual speakers. See *Widmar*, 454 U.S. at 274 & n. 14.

The court of appeals also implied, without elaboration, a distinction between the degree of access granted to non-

[11] CMSD's contention (see, *e.g.*, CMSD Br. in Opp. 7) that the line drawn by its regulations is between "public" and "private" activity, with all "religious" activity falling in the "private" sphere, hardly bears comment. Suffice it to say that a lecture by a recognized authority on issues of child-rearing and threats to the family in modern American life cannot plausibly be characterized as of less "interest to or [less] for the benefit of the public in general," *ibid.*, than lectures on parapsychology or meetings of the Holiday Beach Property Owners Association. See Pet. App. 13a; Pet. 4. See also n. 15, *infra*. The Attorney General of New York eschews any such argument, but his brief in opposition in this Court provides no substitute; he merely asserts, without argument, that the "religious purpose" distinction drawn by state and local law is "reasonable." N.Y. Att'y Gen. Br. in Opp. 12.

religious groups by the university in *Widmar* and the degree of access granted to such groups by CMSD. Pet. App. 14a-15a. Respondents pressed the same argument throughout their briefs in opposition. But both the court below and respondents place too much weight on a factual distinction that can hardly be extracted from this Court's summary references to the breadth of non-religious access in *Widmar*. Unlike the courts below in this case, see Pet. App. 12a-14a, 45a-46a, this Court in *Widmar* undertook no elaborate review of previously permitted uses to discern whether they were "like" or "unlike" the "religious" uses prohibited by the university's policy.[12]

The only other broad, content-based categorical exclusion from the community forum defined by CMSD, for example, is the exclusion of speech "for personal or private gain." Local R. 9.[13] It is far from clear, however, that that exclusion distinguishes this case from *Widmar*. Nothing in *Widmar* suggests that the university's facilities were open for use by student groups for commercial purposes on the same terms that they were open for non-commercial speech. At any rate, there is no basis for concluding from the opinions in *Widmar* that student access to the university's facilities for non-religious use was substantially broader than that afforded by CMSD to non-commercial "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community," N.Y. Educ. Law 414(c), particularly in

[12] Indeed, the Court specifically warned that just this sort of close analysis was the activity most likely to "entangle" government impermissibly in religious questions. 454 U.S. at 272 n.11.

[13] As noted above, the theoretical and practical reach of the restriction on "meetings sponsored by political organizations," N.Y. Educ. Law 414(e), are not clear from the statute, the local rules, or the record in this case. See n. 9, *supra*. In any event, such uses are not categorically excluded, as are religious uses.

light of the history of practically unrestricted non-commercial use revealed by the record. See, *e.g.*, Pet. App. 19a & n.4, Pet. 4-5.[14] Without more, we believe that a fair reading of *Widmar* leads to the conclusion that the policy of generally open access presented by the facts of that case is directly analogous to CMSD's broad opening of its school facilities for community use.

II. EVEN IF THE EXCLUSION OF RELIGIOUS SPEECH IS NOT INVALID UNDER *WIDMAR*, THE EXCLUSION OF PETITIONERS' PROPOSED LECTURE SERIES CONSTITUTES UNJUSTIFIED VIEWPOINT-BASED DISCRIMINATION AND VIOLATES THE FIRST AMENDMENT

It may be difficult in particular cases to decide whether a challenged restriction on speech should be analyzed as a limitation on the extent of the forum that has been created, subject to review only for reasonableness and viewpoint neutrality, or as a limitation on speech within the confines of that forum, subject to strict constitutional scrutiny. See, *e.g.*, *Cornelius*, 473 U.S. at 813-827 (Blackmun, J., dissenting); *Krishna Consciousness*, 112 S. Ct. at 2715-2719 (Kennedy, J., concurring in the judgment). In this case, respondents and the courts below view CMSD's prohibition of an otherwise acceptable presentation because of its perceived "religious purpose" as implementing a legitimate limit on the public forum that CMSD has created in its facilities. See, *e.g.*, Pet. App. 9a-10a, 13a-14a, 31a-32a; CMSD Br. in Opp. 2; N.Y.

[14] The university bulletin quoted at length in the Eighth Circuit's opinion in *Widmar* indicates that the facilities at issue in that case were made available for "cultural, social, educational and recreational programming." The bulletin cites "lectures, symposia, concerts, discussions, receptions, chess and bridge tournaments, • • • [and] other special events" as exemplary uses of the University Center. *Chess* v. *Widmar*, 635 F.2d 1310, 1312 n.1 (8th Cir. 1980).

Att'y Gen. Br. in Opp. 6. Petitioners, on the other hand, contend that CMSD has opened its doors so wide that even if the forum is not wholly open, any remaining limits cannot be applied to exclude religious speech. See Pet. 14-17 & n.9. As just discussed, we believe that *Widmar* compels the conclusion that petitioners are correct.

Whatever the exact limits of the forum at issue here, however, the proper resolution of this case may also be discerned by focusing on the particular speech that the school district seeks to exclude, and on the reasons (or lack of reasons) asserted for that exclusion. Respondents contend, and the courts below found, that CMSD could and did consistently exclude use for "religious purposes" from the types of public use to which it opened its facilities. To allow exclusion of the speech at issue in this case on the basis of vague generalizations about "religious purposes," however, would obscure the fact that what is involved here is discrimination against a particular viewpoint on a topic plainly within the range of otherwise permitted subjects. Because a focused examination reveals that CMSD has excluded petitioners' proposed lecture series solely because of the religious *viewpoint* offered by the lecturer, the school district's decision cannot withstand First Amendment scrutiny.

The lectures at issue here addressed a topic—problems of the contemporary American family—that is unquestionably a matter of public concern. A meeting held to discuss that topic would certainly qualify, in general, as a "civic • • • meetin[g] • • • pertaining to the welfare of the community." N.Y. Educ. Law 414(c). We do not understand respondents to contend otherwise. Moreover, there is no contention that petitioners' program would not have been "non-exclusive and • • • open to the general

public,"[15] *ibid.*, or involved private or personal gain, or that petitioners did not have insurance, intended to gamble, drink liquor, or serve refreshments outside a designated area, or otherwise failed to meet any of the viewpoint-neutral criteria for use of the facilities established by the State and the school district. From all that appears, petitioners' lecture series would have addressed an otherwise permissible issue in an otherwise permissible way. CMSD justified its refusal to permit the lectures solely on the ground that they "appear[ed] to be church related." C.A. App. 352, 359.

Viewed concretely, then, the question in this case is whether a governmental proprietor such as CMSD, having opened its facilities generally for speech on topics of public concern, can constitutionally exclude certain speech on such a topic solely on the basis of the speech's religious point of view, without offering any justification related to the special needs or purposes of the facility in question. But this Court has repeatedly made clear that even in the case of completely nonpublic forums, where the government's power to regulate speech is at its height, the Constitution will rarely tolerate discrimination between other-

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[15] CMSD defines the "general public" for this purpose as "all residents of the school district that form a homogeneous group deemed relevant to the event." Local R. 10. Under that puzzling definition, it would appear that petitioners could have satisfied the statutory requirement by inviting only, for example, local evangelical Christians with children. In fact, of course, petitioners presumably viewed their proposed presentation as of wide general interest, and would have actively encouraged attendance by all members of the Center Moriches community. For these reasons, among others, respondent CMSD's attempt to defend its policies on the ground that they exclude only activities "of interest [only] to • • • specific identifiable groups" or uses "for private purposes not of interest to or [for the] benefit of [the] public in general," CMSD Br. in Opp. 7, is wholly unpersuasive. See also n. 11, *supra*.

wise comparable uses based solely on the views expressed by the speaker. See, *e.g.*, *Krishna Consciousness*, 112 S. Ct. at 2705, 2709 (plurality opinion), 2712 (opinion of O'Connor, J.); *United States* v. *Kokinda*, 110 S. Ct. 3115, 3121-3122, 3124-3125 (1990) (plurality opinion); *Perry*, 460 U.S. at 46. See also *Widmar*, 454 U.S. at 280 (Stevens, J., concurring in the judgment). As the Court stated in *Cornelius*, 473 U.S. at 806 (citations omitted), "[a]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[16]

It is important to note that a government does have the right to impose viewpoint-based restrictions that are closely related to the core purposes of the forum in question,

[16] See also 473 U.S. at 811-813 (remanding for determination of whether facially reasonable justifications for exclusion of particular speech were "a facade for viewpoint-based discrimination"); *id.* at 832-833 (Blackmun, J., dissenting) (exclusion invalid regardless of forum analysis because based on viewpoint); *id.* at 833 (Stevens, J., dissenting) ("[e]veryone on the Court agrees that the exclusion * * * is prohibited by the First Amendment if it is motivated by a bias against the views of the excluded groups"). Courts citing the restriction on viewpoint discrimination often state, following *Perry*, that a regulation may not be "an effort to suppress expression merely because public officials oppose the speaker's view." See *Perry*, 460 U.S. at 46. We do not intimate that the State of New York or the officials of CMSD "oppose" religion in the sense of being actively hostile to its practice or propagation. We think it obvious, however, that respondents' opposition to the use of school facilities for a lecture on the ground of the lecture's religious perspective on an issue of public concern is "oppos[ition to] the speaker's view" for purposes of *Perry* and subsequent cases.

and the right to choose and advance, in the course of its own activities or those it funds, particular points of view in preference to others. In the context of military training at issue in *Greer* v. *Spock*, for example, even the fact that a prior lecture on the specific topic of drug abuse had been permitted on the military base surely would not have required the government to tolerate a proposed lecture on the virtues of illegal drug use. See 424 U.S. at 838 n.10. See also *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1771-1776 (1991) (government can selectively fund activities in the public interest, without giving equal support to competing alternatives); *Jones* v. *North Carolina Prisoners' Labor Union, supra* (prison administrators can give preference to organizations that they determine will advance penological objectives). But the facts of this case are substantially different. The policy at issue here regulates private (not school-sponsored) use of school facilities, outside of school hours, by members of the general community rather than by students, and for social, civic or recreational – rather than educational – purposes. By opening its facilities for uses such as lectures on matters of public concern, CMSD evinced a determination that such uses would not, as a general matter, interfere with the schools' core mission; having made that determination, the school district is no longer in a position to prohibit a particular proposed use simply on the basis of the speaker's point of view.[17]

[17] In *Greer* v. *Spock*, *supra*, the commander of a military training base was allowed to exclude certain partisan political activities that he determined would interfere with the base's core functions, in part on the ground that excluding such speech was consistent with the American tradition of a politically neutral military. See 424 U.S. at 839. A facially similar argument might be made that exclusion of "religious" speech from public school precincts is permissible in order to maintain a strict separation of church and state. The uses of school

The courts below found, Pet. App. 7a-8a, 48a, that CMSD's exclusion of petitioners' proposed speech was "viewpoint-neutral," apparently on the theory that in this context CMSD would discriminate impermissibly only if it allowed, for example, Catholic but not Protestant groups to use its facilities "for religious purposes." See, *e.g.*, Pet. App. 46a, 44a; N.Y. Att'y Gen. Br. in Opp. 12-13. But favoring secular viewpoints over religious viewpoints is no less discriminatory, for purposes of the First Amendment, than favoring one religious viewpoint over another. See, *e.g.*, *Widmar*, 454 U.S. at 281 (Stevens, J., concurring in the judgment). Moreover, while a government generally has the right to adopt a point of view on an issue of public concern and to favor that view in the allocation of public resources, see *Rust* v. *Sullivan*, *supra*, that right is severely limited where the issue in question is religious: under the Establishment Clause, a government may neither favor one religion over another, nor promote "nonreligion" over religion as a favored point of view. See *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952) (government may not "prefe[r] those who believe in no religion over those who do believe"). If CMSD would, as we believe, permit a community lecture on family values from a psychological (or "parapsychological"), sociological, philosophical or

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property at issue here, however, are by definition outside of school hours, involve students only incidentally, and present none of the special dangers of "entanglement," 424 U.S. at 839, described by Justice Powell in his concurring opinion in *Greer*. See 424 U.S. at 844-848. Moreover, this Court has previously rejected the essentially identical argument that a proper concern for preserving church-state separation could justify the exclusion of religious speech from public school forums otherwise open for use by student groups. See *Widmar*, 454 U.S. at 270-277. See also *Westside Community Bd. of Educ.* v. *Mergens*, *supra* (policy of equal access for student religious groups does not violate Establishment Clause).

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secular humanist perspective, it may not prohibit such a presentation from a Christian perspective on the ground—itself invidious—that the same lecture from a Jewish, Moslem or Buddhist perspective would be equally unwelcome.

* * *

In our view, the outcome of this case is controlled by the reasoning and result in *Widmar* v. *Vincent*, *supra*. Having opened its doors as wide as it has, CMSD may not close them just far enough to keep out "religious" speech. If the Court is of a different view, however, then the case can best be decided on the ground that however a local school district may constitutionally limit the public use of its facilities, it simply may not permit a general type of speech, such as lectures on matters of public concern, but exclude a particular speaker on such a topic because he advances a religious point of view.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,

Petitioners,

—v.—

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, NEW YORK CIVIL LIBERTIES UNION, PEOPLE FOR THE AMERICAN WAY, AND UNION OF AMERICAN HEBREW CONGREGATIONS, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles embodied in the Bill of Rights. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates. This case involves two issues of central concern to the ACLU. On the one hand, the ACLU is committed to the separation of church and state. On the other hand, the ACLU is committed to a system of free expression that does not discriminate based on the content of speech. In our view, the proper accommodation of these two constitutional principles necessarily turns on the facts. In this particular case, we are persuaded that the Establishment Clause concerns are minimal. We are also persuaded that the decision below undervalued the free speech interests at stake. Accordingly, we submit this brief as *amicus curiae* in support of petitioners.

Americans United for Separation of Church and State (Americans United) is a national nonprofit, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Americans United is composed of some 50,000 members nationwide and maintains active chapters in several states. Americans United members adhere to various religious faiths, with some holding no religious affiliation. They are united, however, in their commitment to the long-standing American principle of church-state separation. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court. While Americans United believes that public schools should remain free from religious control and influence, it be-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

lieves that this case does not present a threat to this established principle.

People For the American Way (People For) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For has frequently represented parties and filed *amicus* briefs in litigation seeking to defend First Amendment rights, including the rights of free expression and separation of church and state. While People For recognizes that Establishment Clause problems may often be presented when religious speech or activities occur in public school facilities, the facts of this case do not raise such concerns. People For has obtained consent to file an *amicus* brief in this case in order to help vindicate the important First Amendment principles which are at stake, particularly the principle that government cannot properly exclude speech activities from forums such as the school auditorium in this case based on their religious or other content.

The Union of American Hebrew Congregations (UAHC) is the congregational arm of the Reform Jewry, comprising 850 synagogues with a membership of over 1.5 million Jews in the United States. For over the one hundred years of its existence, the UAHC has been a passionate advocate for protecting and strengthening the religion clauses of the First Amendment as the indispensable tools for preserving religious liberty. It has long held that vigorous enforcement of the Establishment Clause is the most effective method for ensuring that religion can flourish free of government control and regulation.

STATEMENT OF THE CASE

Petitioners, Lamb's Chapel and Pastor John Steigerwald ("Lamb's Chapel"), sought permission to use the Center Moriches High School auditorium to show, for viewing by members of the community at large, a series of films addressing contemporary family issues from a religious perspective. The church proposed to show the series during five weekday evenings over a five-week period.[2]

Respondent Center Moriches Union Free School District, relying on New York Education Law §414 and a local implementing rule, denied Lamb's Chapel permission to use the high school auditorium to show the film series. The basis for the denial of access was not the subject matter of the films -- contemporary family issues -- but their religious perspective.

Under Education Law §414, local school boards are allowed to open school facilities to the community for educational, civic, recreational and social purposes. These enumerated purposes have been held not to include use for religious purposes. *Trietley v. Board of Education of the City of Buffalo*, 409 N.Y.S.2d 912, 915 (4th Dep't 1978).[3]

Applying this Court's precedents as interpreted by the Second Circuit in its own prior decisions, the court

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[2] The film series ("Turn Your Heart Toward Home") is described in a brochure reproduced in the Joint Appendix (J.A.) at pp.85-89. Lamb's Chapel previously had sought to use the school's facilities for Sunday morning services. That request was denied. The church has not challenged the denial of that request and the school district's denial of the request is not before the Court in this case. *See* Cert. Pet. at 5 n.2.

[3] *But see Travis v. Owego-Appalachian School District*, 927 F.2d 688 (2d Cir. 1991)(school board required to allow use of school auditorium for religious fund-raiser, despite Education Law §414, because similar activities had been permitted in the past).

of appeals held that the school district's action did not violate the First Amendment. The court ruled that the school district had opened its facilities for use as a "public forum" but had done so only with respect to the uses enumerated in Education Law §414. Because the school district had not opened its facilities to use for religious purposes, the court held that it was not required to do so here. The court, however, did not identify any independent factor justifying the state's refusal to allow access to its facilities for religious purposes. Treating as plenary the government's power to define the extent to which its property may be used as a public forum, the court deemed the fact of the religious exclusion to be sufficient justification for the exclusion.[4]

As its earlier cases make clear, the Second Circuit's decision was derived from this Court's statement in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983), that "[a] public forum may be created for a limited purpose such as use by certain groups, *e.g.*, *Widmar v. Vincent* (student groups), or for the discussion of certain subjects, *e.g.*, *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n* (school board business)".[5] As the Second Circuit interpreted this principle, the government may designate its property as a public forum for limited purposes without having to justify those limits.

The court stated that its decision was not inconsistent with *Widmar v. Vincent*, 454 U.S. 263 (1981), or *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), because the school authorities in those cases had established a "generally open forum" for student use and because students "have a greater claim on the use of school property than outsiders." *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381, 388-89 (2d Cir. 1992). According to the court, the instant case involves, by contrast, "outside organizations seeking access where access has been limited and all religious use has been barred by policy and practice." *Id.* at 389.

SUMMARY OF ARGUMENT

The question of when a religious group's use of government property presents a valid claim of equal access, *see, e.g.*, *Mergens*, 496 U.S. 226, and when, instead, granting it access crosses the line into government endorsement of religion, *see, e.g.*, *Kaplan v. City of Burlington*,

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[4] The cases that the Second Circuit relied on had not actually upheld a prohibition on a religious use of school property. In addition to *Travis*, *see* n.2 *supra*, the court of appeals cited *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79 (2d Cir. 1991)("Deeper Life II") (dismissing as moot a church's challenge to a school board's denial of a request to use a public school auditorium temporarily for religious meetings on Sundays), and *Deeper Life Christian Fellowship, Inc. v. Board of Education of the City of New York*, 852 F.2d 676 (2d Cir. 1988)("Deeper Life I")(affirming a preliminary injunction requiring school board to permit temporary use of a school auditorium on Sundays in light of board's past practice of granting permits to other religious organizations). The Second Circuit relied in *Deeper Life I* on its earlier decision in *Calash v. City of Bridgeport*, 788 F.2d 80 (2d Cir. 1986)(denying concert promoter access to municipal stadium for rock concert on the ground that the stadium was not a public forum). *Compare Brandon v. Board of Education of Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980)(Establishment Clause compelled school board's refusal, pursuant to Education Law §414, to allow joint prayer sessions in a public high school before classes began but during school hours), *cert. denied*, 454 U.S. 1123 (1981).

[5] *Deeper Life I*, 852 F.2d at 679-80; *Calash*, 788 F.2d at 82, 84. This principle was repeated, without the illustrative citations, in *Cornelius v. NAACP Legal Defense Fund, Inc.*, 473 U.S. 788, 802 (1985)("[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."). The same conditions on access may be imposed in a nonpublic forum. *See id.* at 806; *United States v. Kokinda*, __ U.S. __, 110 S.Ct. 3115, 3121-22 (1990).

891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 296 (1990), is often a difficult one to answer. The determination turns on issues of context that necessarily are fact-specific, and the constitutional calculus inevitably changes as the religious presence on public property becomes more pervasive. *See Widmar*, 454 U.S. at 273-74.

Here, we are persuaded that granting the access that Lamb's Chapel seeks is unlikely to be perceived as a government endorsement of religion. Lamb's Chapel seeks access to the school during nonschool hours when the school building is the functional equivalent of a municipal auditorium or hall. Consequently, this record does not present the special problems associated with mingling religion and school. *See Lee v. Weisman*, __ U.S. __, 112 S.Ct. 2649, 2655 (1992). Moreover, the access that Lamb's Chapel seeks does not appear to be significantly different, either in quality or quantity, from the access granted to other community groups. Like the Second Circuit, therefore, we approach this case primarily from a free speech perspective. From a free speech perspective, we are convinced that the decision below is seriously flawed and should be reversed.

When this Court stated in *Perry* that "[a] public forum may be created . . . for the discussion of certain subjects," 460 U.S. at 46 n.7, it was making a very modest, commonsense point -- that the First Amendment does not prevent the government from insisting that persons who wish to address a public body at a public meeting stick to the business at hand. A public body could not do its work if those claiming its attention were free to speak at any time on any subject. For that reason, "public bodies may confine their meetings to specified subject matter." *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976).

The Second Circuit, first in *Calash* and then in *Deeper Life I*, and finally in this case, transmuted this

very modest principle into a rule that tolerates viewpoint discrimination in the designation of a public forum, allowing the government to limit speech on the basis of the speaker's purpose and perspective. Thus, under the Second Circuit's decision, Lamb's Chapel may not show films addressing contemporary family issues because it proposes to address those issues from a religious perspective and to convey a religious message in doing so. Such viewpoint discrimination is impermissible in a public or nonpublic forum.

The court of appeals further misinterpreted the principle stated in *Perry* as imposing no obligation on the government to *justify* the limitations that it seeks to impose on speech in a designated public forum. So far as the Second Circuit was concerned, the fact that the government had not chosen to allow religious expression in a designated public forum was the reason the expression did not have to be permitted. Thus, Lamb's Chapel was forbidden to show its films at a time when the school property in question was not being used for any other purpose with which the petitioners' proposed activity would have been inconsistent. Their proposed activity, in fact, was inconsistent with only one thing -- the exclusion of religious speech from school facilities. Exclusion for the sake of exclusion is impermissible even in a nonpublic forum.

The decision below underscores, once again, the central flaw of the *Perry* test -- its tendency to serve as "a jurisprudence of categories rather than ideas," *International Society of Krishna Consciousness, Inc. v. Lee*, __ U.S. __, 112 S.Ct. 2701, 2715 (1992)(Kennedy, J., concurring in the judgment), encouraging a narrow focus on the correct application of a mechanistic formula rather than the protection of basic First Amendment freedoms.

Amici respectfully submit that the *Perry* test should be replaced by a functional test requiring the government to show that the expression it seeks to exclude

from its property is "basically incompatible with the normal activity of [the] particular place at a particular time." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). The government certainly must provide more of a justification for limiting speech on its property than the mere fact that it has chosen to do so. Regardless of whether the *Perry* test is modified, the decision below should be reversed on free speech grounds.

ARGUMENT

I. THE SPECIFIC FACTS OF THIS CASE DO NOT PRESENT A CLASH BETWEEN THE ESTABLISHMENT CLAUSE AND PETITIONERS' FREE SPEECH CLAIMS

In previous cases, this Court has recognized that serious Establishment Clause problems may be presented when public school facilities are used for expressive purposes related to religion. "The public school is at once the symbol of its democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools." *McCollum v. Board of Education*, 333 U.S. 203, 231 (1948)(Frankfurter, J. concurring). Where use of public school facilities or personnel for religious purposes would convey a message of official support for religion or confer on a church more than incidental benefits, for example, this Court has indicated that the result would violate the Establishment Clause.[6] Indeed, this Court has specifically noted that complying with a public school authority's constitutional obligations under the Establishment Clause may constitute a compelling interest justifying restrictions on speech and expression. *Widmar v. Vincent*, 454 U.S. at 271.

[6] *See Weisman*, 112 S.Ct. 2649; *id.* at 2672-76 (Souter, J., concurring); *Mergens*, 496 U.S. at 248 (plurality opinion); *Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1985); *Widmar*, 454 U.S. at 273-74.

Although this case concerns use of public school facilities for religiously oriented speech, Establishment Clause dangers are not present on the facts of this case. The proposed use of the public school facilities here is limited, occasional, and comparable to other uses already permitted by Center Moriches. Lamb's Chapel wishes to use the high school auditorium once a week for five weeks. The use would occur in the evenings, well after school hours. The activity is not uniquely religious, like worship or prayer, nor is it addressed only to the faithful; it is, instead, a discussion of a subject of general interest, albeit from a religious perspective, addressed to the whole community.[7] The activity would not be promoted by the school. Moreover, the school district has authorized frequent use of school facilities by many other outside groups to pursue their own diverse interests -- for example, the Manorville Humane Society, the Moriches Bay Civic Association, the Holiday Beach Property Owners Association, and the Committee on the Busing Vote. *See* Cert.Pet. at 4 & n.1.

Under these specific circumstances, *amici* do not believe that petitioners' use of the school facilities would violate the Establishment Clause. *See Lemon v. Kurtzman*, 403 U.S. 603 (1971). As in *Widmar*, there clearly is a secular purpose in the school district's allowing petitioners to use its facilities. *See Widmar*, 454 U.S. at 275. In addition, the benefit to religion is truly incidental and there is no realistic danger that students or community

[7] As noted, Pastor Steigerwald had previously requested use of school facilities to conduct Sunday morning church services, but he has not renewed or contested the denial of that request, and that issue is not before this Court. *See* Cert.Pet. at 5 n.2. *Cf. Weisman*, 112 S.Ct. at 8656 (discussing significance of conduct of overtly religious exercise at school function on school property). For the reasons stated above, such a request would pose more serious Establishment Clause problems.

members could perceive that the school district is endorsing religion. *Id.* at 276-77. Moreover, there is no risk of undue entanglement with religion under the circumstances of this case.

It is important to recognize that different circumstances, such as use of school facilities for religious purposes at 3:45 p.m. or every Sunday morning for church services, could well lead to a different result. *Cf. Trietley*, 409 N.Y.S.2d at 916-17 (even if state law permitted school facilities to be used for religious purposes under some circumstances, the Establishment Clause would preclude use for meetings of student bible clubs to be supervised and moderated by school staff members during nonschool hours). But Lamb's Chapel does not seek special access to Center Moriches students during the school day. *See McCollum v. Board of Education*, 333 U.S. 203. It is not seeking any special privilege not otherwise available or afforded to secular groups, and it would not be granted any unique benefit or advantage if allowed access. *See Texas Monthly v. Bullock*, 489 U.S. 1 (1989).

In short, in this instance, as in *Widmar*, this Court can and should decide the case based on free speech principles and not reach the questions that would arise if Establishment Clause concerns were present. *Widmar*, 454 U.S. at 273 n.13. On that basis, as we explain below, the decision of the court of appeals was erroneous and should be reversed.

II. DENYING ACCESS TO LAMB'S CHAPEL CANNOT SURVIVE SCRUTINY UNDER *PERRY*

A. Prohibiting Speech "For Religious Purposes" Is Impermissible Viewpoint Discrimination

In upholding the school district's refusal to grant Lamb's Chapel access to its facilities in this case, the

Second Circuit ultimately relied on the principle that the government may designate a public forum limited to "the discussion of certain subjects." *Cornelius*, 473 U.S. at 802; *Perry*, 460 U.S. at 46 n.7. But the court's reliance on this principle was misplaced. Lamb's Chapel was denied access to the school district's facilities not because of the "subject" it wished to discuss -- "the protecting and strengthening of family relationships" (J.A.86) -- but because it wished to discuss that subject from a religious perspective. Petitioners have been denied access to the school's facility's "because of the views that they express." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Such discrimination is forbidden *regardless* of whether the forum is public or nonpublic in nature. Thus, this Court has stated that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral." 473 U.S. at 806. As Justice Brennan explained in his dissenting opinion in *Perry*:

> Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not . . . . We have never held that the government may allow discussion of a subject and then discriminate among viewpoints on that particular topic, even if the government for certain reasons may exclude discussion of the subject from the forum. In this context, the greater power does not include the lesser because for First Amendment purposes exercise of the lesser power is more threatening to core values. Viewpoint discrimination is censorship in its purest form and government regulation that

> discriminates among viewpoints threatens the continued vitality of "free speech."

460 U.S. at 61-62.

It is undisputed that one of the church's purposes in presenting its film series was to convey a religious message. But nothing in this Court's precedents suggests that government may limit access to a designated public forum, to address a subject that other speakers may address, based on a speaker's purpose in addressing that subject. To the contrary, this Court has held squarely that a speaker may *not* be denied access to a designated public forum because of the speaker's views. *City of Madison Joint School District*, 429 U.S. at 175-76. *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555-56 (1975).

The school district and the New York State Attorney General suggest that the policy applied in this case is viewpoint neutral because it excludes *all* religious speech -- all speech "for religious purposes" -- and not just the particular religious viewpoint espoused by Lamb's Chapel.[8] But it is, in fact, the exclusion of religious speech as such from facilities open to speech presenting nonreligious (or even antireligious) perspectives that constitutes the forbidden viewpoint-discrimination in this case.

The distinction between "religious" and "nonreligious" speech is a distinction based directly and inescapably on the speaker's viewpoint. It turns on whether or not the speaker promotes religion in some respect, or is neutral or hostile to religion instead. *See Widmar*, 454 U.S. at 271 n.9. *See also May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986)(Posner, J.)(prohibiting religious speech in public or nonpublic forum where other speech is allowed "would be a restriction discriminating against a particular point of view and would therefore flunk the test . . . [of] *Cornelius*, provided that the defendants have no defense based on the establishment clause").[9] That the exclusion covers all religious viewpoints scarcely makes it less viewpoint-based, although it does elevate the discrimination to a higher and more inclusive level of generality. "[T]he First Amendment forbids the government to regulate speech in ways that favors some viewpoints or ideas at the expense of others." *Taxpayers for Vincent*, 466 U.S. at 804.[10]

Cornelius, cited by the Attorney General, is not to the contrary. The Court in that case upheld a policy denying "advocacy groups" access to the Combined Federal Campaign (CFC). It held that such a denial was not viewpoint based. For the reasons discussed above, the school district's prohibition of speech "for religious purposes" is viewpoint based. But even if the school district's prohibition were regarded as simply content-based, *see Boos v. Barry*, 485 U.S. 312, 319 (1988), and hence permissible in a *nonpublic* forum such as the CFC, content-based exclusions from the school facilities involved in this case, which have been designated for use as a *public* forum, require compelling justification to survive. *Lee*, 112 S.Ct. at 2705; *Kokinda*, 110 S.Ct. at 3119; *Perry*, 460 U.S. at 46.

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[8] *See* Op.Cert. of Defendants-Respondents at 8; Op.Cert. of Respondent Attorney General at 12.

[9] "[E]ven in a non-public forum, the government's interest in interfering with the free market in ideas through discriminatory restrictions on particular points of view (such as the religious) is slight, and the potential injury to this important market significant." *Id.*

[10] It is immaterial, of course, whether the government was motivated by hostility toward religious viewpoints. "'Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Simon & Schuster v. Members of the New York State Crime Victims Board*, __ U.S. __, 112 S.Ct. 501, 509 (1992)(citation omitted).

B. The Government May Not Limit The Subjects That May Be Discussed In A Designated Public Forum Except To Allow A Government Body To Perform Its Official Functions

Even assuming that the school district's denial of access in this case was based on the fact that Lamb's Chapel had proposed to address a "subject" to which the school facilities had not been opened for discussion, the Second Circuit misapplied this Court's precedents in failing to require New York to justify the exclusion of that subject from those permitted to be discussed. In failing to require the state to justify the exclusion, the court effectively granted the government "authority to restrict speech by fiat." *Lee*, 112 S.Ct. at 2715 (Kennedy, J., concurring).

As noted, the principle allowing the government to create a public forum limited to the discussion of certain subjects merely recognizes the reality that a government body would be unable to perform its official functions if it could not maintain control over its own agenda. The Ninth Circuit made the point in a recent case:

> [A] City Council meeting is still just that, a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with. Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact . . . . [I]n dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand.[11]

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[11] *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. (continued...)

Aside from occasional school-related meetings (to which meetings of outside groups must give way), Center Moriches High School performs no government functions during weekday evenings. It performs no business with which showing "Turn Your Heart Toward Home" would be inconsistent. The principle ultimately relied on by the Second Circuit in this case to restrict speech -- a principle designed to permit a government body to do its job -- simply does not apply.

New York State has generally opened its school facilities for expressive activity by outside groups, just as the university in *Widmar* had generally opened its facilities for expressive activity by student groups. Limitations on access to those school facilities thus bear "a heavy burden of justification." *Widmar*, 454 U.S. at 268. Regulations limiting speech on property designated for use as a public forum are "subject to the same limitations as that [*sic*] governing a traditional public forum." *Lee*, 112 S.Ct. at 2705. "Such regulations survive only if they are narrowly drawn to achieve a compelling state interest." *Id. See also Police Dep't v. Mosley*, 408 U.S. 92, 98-99 (1972)("justifications for selective exclusions from a public forum must be carefully scrutinized"). There is no suggestion that the school district's denial of access to Lamb's Chapel in this case could remotely satisfy this stringent test.

Even if the Center Moriches facilities were consid-

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[11] (...continued)
1990)(footnotes omitted). Or, as Justice Stevens has observed:

> Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to say that a "time, place, or manner restriction may not be based upon either the content or subject matter of speech."

Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 544-46 (1980)(Stevens, J., concurring in the judgment)(citation omitted).

ered to be a nonpublic forum, restrictions on speech in such a forum must themselves satisfy a requirement of reasonableness. *See Lee*, 112 S.Ct. at 2705, 2708. To survive, a limitation on speech in a nonpublic forum must be "reasonable in light of the purpose which the forum at issue serves." *Perry*, 460 U.S. at 49. This test would be entirely circular, however, if it is the government's decision to open the forum to speech only for specified purposes that makes the exclusion of other speech "reasonable." To admit such a "circular defense" would be to allow the government to "sidestep judicial review." *Simon & Schuster*, 112 S.Ct. at 510. *Cf. Plyler v. Doe*, 457 U.S. 202, 227 (1982)("the State must do more than justify its classification with a concise expression of an intention to discriminate").

As Justice O'Connor suggested in her concurring opinion in *Lee*, the government should be required to offer some "independent reason" for limiting speech even in a nonpublic forum -- to make some showing that the expressive activity at issue is "incompatible" with the nature and function of the forum. 112 S.Ct. at 2714.[12] No such "independent reason" or functional justification -- sufficient or insufficient -- has been offered for the exclusion of religious speech from school facilities in the circumstances of this case.

[12] *See id.* at 2718 (Kennedy, J., concurring)(considering "compatibility" in determining whether forum is public); *id.* at 2724-25 (Souter, J., concurring)(same, *citing Grayned v. City of Rockford*, 408 U.S. 104, 116).

III. RESTRICTIONS ON SPEECH SHOULD BE JUDGED BY THE NATURE OF THE GOVERNMENT'S INTEREST AND NOT BY THE ARTIFICIAL CATEGORIZATION OF ITS PROPERTY

For the reasons stated above, *amici* believe the decision below is inconsistent with current public forum doctrine. More fundamentally, however, *amici* believe that the decision below illustrates basic shortcomings in public forum law, at least as that law has been understood and applied by numerous courts around the country.[13]

As initially conceived, public forum law was designed to enhance free speech opportunities. *See Hague v. CIO*, 307 U.S. 496, 515-16 (1939)(Roberts, J.). Through an evolutionary process, it has ceased to perform that speech-enhancing role. Indeed, to the contrary, public forum law increasingly has become a ceiling, rather than a floor, on the exercise of First Amendment rights, "serv[ing] to obfuscate rather than clarify the issues at hand." *Kokinda*, 110 S.Ct. at 3127 (Brennan, J., dissenting). As a result, public forum law no longer provides meaningful guidance to lower courts, public officials or those seeking to exercise their First Amendment rights on public property.

It is not surprising, therefore, that this case marks the third time in as many years that the Court has been called upon to clarify the contours of public forum law.

[13] The public forum doctrine has been the subject of considerable criticism, both by members of this Court and by legal scholars. *See, e.g., Cornelius*, 473 U.S. at 813 (Blackmun, J., dissenting); *id.* at 833 (Stevens, J., dissenting); *Greer v. Spock*, 424 U.S. 828, 859-60 (1976) (Brennan J., dissenting). *See also* L. Tribe, American Constitutional Law 992-93 (2d ed. 1988); Stone, "Content-Neutral Restrictions," 54 U. Chi.L.Rev. 46, 93-94 (1987); Farber & Nowak, "The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication," 70 Va.L.Rev. 1219, 1220-24 (1984).

Lee, 112 S.Ct. 2701; *Kokinda*, 110 S.Ct. 3115. The very frequency with which the issue is arising is an indication of serious doctrinal problems. Unfortunately, the decision below also demonstrates that the problems with *Perry* go beyond mere ambiguity. In our view, the conceptual framework of *Perry* suffers from a central inconsistency that the facts of this case have clearly exposed.

On the one hand, *Perry* holds that the government may create a "designated public forum" by opening its property for expressive use and that, having created a designated public forum, the government may not discriminate on the basis of content. 460 U.S. at 45-46. On the other hand, *Perry* also has been read as standing for the proposition that the government may create a "limited" public forum from which certain speech is excluded because of its content.[14]

These two propositions are logically irreconcilable when, as here, the universe of included speech dwarfs the universe of excluded speech. Under these circumstances, there is no principled way to determine whether the excluded speech is on the wrong side of the forum's limiting definition (in which case the constitutional claim fails) or whether the excluded speech is the subject of content discrimination in a designated public forum (in which case the constitutional claim succeeds).

The Second Circuit fell into the trap set by *Perry* when it stated that "the school property in question falls within the subcategory of 'limited public forum,' the classification that allows it to remain non-public except as to specified uses." 959 F.2d at 386. If the state can justify content discrimination in a "designated public forum" simply by relabeling it a "limited" forum -- open to all speech except that which is excluded -- then the exception effectively has swallowed the rule. *See generally* Post, "Between Governance and Management: The History and Theory of the Public Forum," 34 U.C.L.A. L. Rev. 1713, 1756-57 (1987).

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[14] This confusion, we respectfully submit, was only perpetuated in *Lee*, 112 S.Ct. at 2705, when the Court described the second category of property under *Perry* as:

> the designated public forum, whether of a limited or unlimited character -- property that the state has opened for expressive activity by part or all of the public . . . . Regulation of such property is governed by the same limitations as that [*sic*] governing a traditional public forum.

Amici have no quarrel with the insight that free speech rights are intertwined with the nature and function of the property to which access is sought. But nearly a decade after *Perry*, it is abundantly clear that the constitutional inquiry compelled by the First Amendment must be more nuanced than the rigid taxonomy that *Perry* prescribes. In undertaking this reevaluation, it is immaterial whether the "formulaic" approach that *Perry* has spawned, *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 377 (5th Cir. 1989), is a fair reading of *Perry*'s original intent or a misinterpretation. The time has come to refocus attention on the essential First Amendment question posed by the public forum cases: has the state presented an adequate justification for curtailing speech at a particular location at a particular time? Moreover, that question can best be answered, as this Court has recognized in the past, by requiring the government to demonstrate that "the characteristic nature and function of the particular forum," *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), are "basically incompatible" with the speech the government seeks to ban, *Grayned v. City of Rockford*, 408 U.S. at 116.

Last Term's decision in *Lee* represented an important step toward reinvigorating this functional analysis. Indeed, a strong argument can be made that a majority of this Court already has turned away from the "jurisprudence of categories" that *Perry* seemingly favors. Justice

O'Connor's concurring opinion, which was decisive to the outcome in *Lee*, carefully stressed that any restriction on speech "must be assessed in light of the purpose of the forum and all the surrounding circumstances." 112 S.Ct. at 2712, *quoting Cornelius*, 473 U.S. at 809.

Justice Kennedy's opinion, which was joined in this regard by Justices Blackmun, Stevens and Souter, was even more explicit:

> If the objective, physical characteristics of the property at issue and the actual public access and uses which have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important consideration is whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property. In conducting the last inquiry, courts must consider the consistency of those uses with expressive activities in general, rather than the specific sort of speech at issue in the case . . . .

Lee, 112 S.Ct. at 2718.

The decision below was decided without the benefit of this Court's opinions in *Lee*. However, the Second Circuit's approach suffers precisely the defect that Justice Kennedy described in *Lee* when he wrote: "[T]he critical step in the [c]ourt's analysis is a classification of the property that turns on the government's own definition or decision, unconstrained by an independent duty

to respect the speech its citizens can voice there." *Id.* at 2716.

Had the Second Circuit focused instead on the functional question of whether the use of the school facilities proposed by Lamb's Chapel "would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property," *id.* at 2718, there is little doubt that the outcome would have been different. At the very least, the Second Circuit would have focused on the far more relevant issue of whether the proposed use of the property violates the Establishment Clause. If the answer to that question is no, as *amici* believe it to be on the specific facts of this case, then nothing in the Second Circuit opinion even remotely suggests an adequate justification for discriminating against petitioners' speech.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 91-2024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT and LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

1. The school district's denial of access to petitioners is violative of the First and Fourteenth Amendments' ban on viewpoint-based discrimination.

Viewpoint-based discrimination involves differential treatment by the State of expression or attempted expression by non-government speakers based on the speakers' differing positions on a given topic. The school district would grant access to its facilities to any individual or group—including petitioners—for the purpose of addressing, or advocating a position on, the topic of family life, as long as that discussion or advocacy is not based on a religious approach. Petitioners' religious viewpoint on the topic of family life is thus the school district's basis for suppressing petitioners' speech. For that reason alone—regardless of the nature of the forum created by the State—the school district's exclusion of petitioners' speech offends the Constitution.

2. The court below erred in its analysis of the forum issue, and that error provides a second independent ground for reversal.

The Court of Appeals determined that the forum created by the school district is a limited public forum, and that speech for religious purposes is outside the scope of that limitation. That court's analysis as to the limited nature of the forum, and as to the determination of the limitation, is based entirely on the school district's own statement as to the scope of the forum.

But whether a forum created by the State is a public forum, a limited public forum, or a non-public forum is a matter of federal constitutional law, not simply of the characterization given to the forum by the government entity involved. As this Court's cases involving limited public fora illustrate, the defining characteristic of a "limited public forum" is that expression for its own

sake is not the government objective for which the forum was created; rather, in such a forum, expression by non-government speakers is a means of furthering a particular government objective other than pure expression. Expression that is outside the scope determined by the government objective that underlies the creation of the forum is therefore expression that the State may legitimately classify as outside the scope of the limited public forum.

Here, the school district opened its facilities during non-instructional time for use by non-government speakers to accomplish no other government purpose than the provision of a place for expression. That being so, as in *Widmar v. Vincent*, 454 U.S. 263 (1981), the State's express exclusion of expression based on a religious approach cannot define the forum for constitutional purposes. Here, as in *Widmar*, there is no nexus between the reasons that led the State to create the forum and the purported restriction on speech. The State's interest in creating a forum for undirected expression by non-government speakers simply provides no principled basis for excluding specific subject matters from that forum.

ARGUMENT

1. The facts essential to frame the constitutional issue presented here are as follows:

Pursuant to state law and its own local rules, the school district makes its facilities available during certain non-instructional hours to individuals or groups not associated with the school district for a wide range of non-school-related purposes, including:

> For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainments and uses shall be non-exclusive and open to the general public. [N.Y. Educ. Law § 414.1(c) (McKinney 1988 & Supp. 1992); Pet. App. 53a.]

The state statute as judicially interpreted and the school district rules go on to provide that "[t]he school premises shall not be used by any group for religious purposes." Pet. App. 56a.

A local church and its pastor, petitioners, applied for permission to use the school district's facilities to show a film series to the public on the subject of family life. The school district requested "'a more detailed description of your proposed use (including a brochure describing the film)'" because the school district "'suspect[ed] that [the film] would certainly have religious connotations.'" *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 959 F.2d 381, 384 (2d Cir. 1992). The pastor submitted a brochure, which the court below described as follows:

> In the film, Dr. James Dobson, said to be an expert on family life, "reminds parents of society's slide toward humanism—the undermining influences of radio, television, films and the press—which can only be counterbalanced by a loving home where Christian values are instilled from an early age." [959 F.2d at 384.]

Based on this description, the school district rejected petitioners' application, stating: "'This film does appear

to be church related and therefore your request must be refused.'" *Id.*

2. In our view, the school district's denial of access to petitioners is plainly violative of the First and Fourteenth Amendments' ban on viewpoint-based discrimination.

"Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster v. New York Crime Victims Board*, 112 S.Ct. 501, 508 (1991) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)). The constitutional limitation on content-based regulation extends both "to restrictions on particular viewpoints," and "to prohibition of public discussion of an entire topic." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980). In part 3, *infra*, we analyze the circumstances in which the State may have some power to exclude "discussion of an entire topic" from a particular forum.

Be that as it may, the dispositive point here is that, regardless of the nature of the forum, the State may *not* restrict speech based on the viewpoint of the speaker. "The existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). *See also International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705-06 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Precisely defined, viewpoint-based discrimination involves differential treatment by the State of expression or attempted expression by nongovernment speakers based on the speakers' differing positions on a given topic. This Court's cases are uniform in holding that such discrimination is *not* a proper basis for suppression of speech by the State. *See, e.g., Cornelius v. NAACP Legal De-*

fense & Educ. Fund, supra, 473 U.S. at 806 ("the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"); *Police Dep't v. Mosley*, 408 U.S. 92, 96 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 785-86 (1978) ("[e]specially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended" (footnote omitted)). *See also Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969).

The school district's exclusion of petitioners from the forum here is a classic instance of viewpoint-based discrimination. The school district would grant access to its facilities to any individual or group—including petitioners—for the purpose of addressing, or advocating a position on, the topic of family life, as long as that discussion or advocacy is not based on a religious approach. Thus, the school district would provide a forum for meetings at which theories of family life could be espoused based on secular perspectives such as psychology, parapsychology, sociology, or the physical sciences.

Yet, the school district barred petitioners from using the same facilities to espouse their views on the *same topic*, family life, because petitioners' views on that topic rest on a religious base—*viz.*, the importance of "'a loving home where Christian values are instilled from an early age.'" 959 F.2d at 384. Petitioners' viewpoint on the topic of family life is the school district's basis for suppressing petitioners' speech, and for that reason alone the school district's exclusion of petitioners' speech offends the Constitution.

3. As this Court stated in *Cornelius v. NAACP Legal Defense & Educ. Fund, supra:*

> [T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum. [473 U.S. at 800.]

Application of this analysis in any given case depends on a determination whether the forum in question is a public forum, a limited public forum, or a nonpublic forum. *Id.*; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, *supra*, 460 U.S. at 45-46. For the reasons stated in part 2, *supra*, it is our view that the result in this case is the same whether the forum from which petitioners were excluded is characterized as a public forum, a limited public forum, or a nonpublic forum. We are equally certain that the court below erred on the forum issue and that its error provides a second independent ground for reversal. We turn to demonstrating as much now.

The Court of Appeals determined that the forum created by the school district is a limited public forum, and that speech "for religious purposes" is outside the scope of that limitation. That court's analysis as to the limited nature of the forum, and as to the definition of the limitation, is based entirely on the school district's own statement of the scope of the forum. Because the school district rules—as well as the definitive judicial interpretation of the state statute—provide that school district premises "shall not be used by any group for religious purposes," the court below concluded that the forum created by a school district is a limited public forum excluding expression "'for religious purposes.'" 959 F.2d at 387. So far as the Court of Appeals was concerned, the school district's statement of the scope of the forum the school district intended to create *conclusively determines* the scope of that forum for the purposes of determining the constitutional rights of those

who wish to use the forum as a medium of expression. That understanding of the governing law is in error.

Whether a forum created by the State is a public forum, a limited public forum, or a nonpublic forum for purposes of the federal Constitution is a matter of federal constitutional law, not a matter simply of the characterization given to the forum by the government entity involved. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981); *see also Cornelius v. NAACP Legal Defense & Educ. Fund, supra*, 473 U.S. at 805 ("The decision of the Government to limit access to the CFC is not dispositive in itself; instead it is relevant for what it suggests about the Government's intent in creating the forum").

At its root, the constitutional concept of a limited public forum derives from the understanding that aside from those parts of the public property that have traditionally been recognized as public fora—streets and parks being the classic examples (*Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.))—the remainder of the property held by the State need not be opened as places for expression by nongovernment speakers. The State may use those of its facilities that are in this latter category in the manner the State determines is best suited to accomplish the State's legitimate objectives. "'The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n, supra*, 460 U.S. at 46 (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)).

The State, of course, may dedicate some of its property to the creation of public fora in addition to those that exist by virtue of our constitutional tradition. For example, the State may devote a public auditorium to use as a place for general public expression. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). A public forum so created by the State is subject to all of

the constitutional constraints on government regulation of speech that apply to a traditional public forum, so long as the State continues that use of the property. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, supra*, 460 U.S. at 46.

Alternatively, as the Court has recognized, the State may open government property to nongovernment speakers as a means of furthering some governmental objective other than the objective of facilitating the *general* exchange of ideas. Thus, a government entity may determine that a public meeting should be held to discuss—and to thereby secure guidance from the citizenry on—a specific question of policy, without opening that meeting to discussion of other policy questions. *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976). A public university or high school may determine that it would enrich and supplement the educational experience of its students to permit student groups to use its facilities for meetings or gatherings on subjects of the students' choosing, without granting the same permission to nonstudents. *See Widmar v. Vincent, supra; Bd. of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990). A community may decide to enhance the cultural lives of its children by devoting a public auditorium to use by those who put on plays for children, without opening the auditorium to other types of uses by nongovernment speakers. *Cf. Southeastern Promotions, Ltd. v. Conrad, supra*, 420 U.S. at 572-73 (Rehnquist, J., dissenting).

As each of these examples illustrates, the defining characteristic of a "limited public forum" is that expression by nongovernment speakers is a means of furthering a particular government objective. That objective, in turn, determines the scope of the limited public forum that is created. Simply put, the defining characteristic of a limited public forum is that expression for its own sake is not the government objective for which the forum was

created; rather, in such a forum, expression by nongovernment speakers is a means of furthering a particular government objective other than pure expression. Thus, expression that is outside the scope determined by the government objective that underlies the creation of the forum is expression that the State may legitimately classify as outside the scope of the limited public forum.[1]

The concept of a limited public forum should not be allowed to float free from its rationale. If the State were

[1] The State does not necessarily create a public forum, even a limited public forum, merely by granting certain nonpublic speakers access to public facilities. "Not every instrumentality used for communication . . is a traditional public forum or a public forum by designation." *Cornelius v. NAACP Legal Defense & Educ. Fund, supra*, 473 U.S. at 803. Thus, although some communication by nongovernment speakers was involved, the *Cornelius* Court ruled that the Combined Federal Campaign, a consolidated medium for charitable solicitation in the federal workplace, is a *nonpublic* forum:

> The historical background indicates that the Campaign was designed to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by *lessening* the amount of expressive activity occurring on federal property. Indeed, the OPM stringently limited expression to the 30-word statement included in the Campaign literature. The decision of the Government to limit access to the CFC is not dispositive in itself; instead, it is relevant for what it suggests about the Government's intent in creating the forum. The Government did not create the CFC for purposes of providing a forum for expressive activity. That such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes. [473 U.S. at 805 (emphasis in original).]

See also Perry Education Ass'n v. Perry Local Educators' Ass'n, supra (allowing the union that is the exclusive bargaining representative of a school district's employees to use the school district's internal mail system did not make that system a public forum); *Greer v. Spock, supra* (allowing occasional civilian speakers on a military base did not make the base a public forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (selling commercial advertising space on vehicles in a public transit system did not make such space a public forum).

able to define a limited public forum merely by the *ipse dixit* that certain subjects or certain speakers are excluded from the forum, the framework established for analysis of the constitutional rights at stake would be infinitely manipulable and the integrity of the underlying rights would be at risk.

The instant case illustrates the point. Here the school district opened its facilities during noninstructional time for use by nongovernment speakers to accomplish no other government purpose than the provision of a place for expression. So far as appears, the school district had no affirmative interest in facilitating the discussion of any particular topic or in stimulating expressive activity for the benefit of, or by, any particular group. That being so, the purposes of this forum are no different than the purposes of a traditional public forum: "assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO, supra*, 307 U.S. at 515.

When the forum is of this nature, the State's claim to exclude certain subjects from the forum should have no more validity than the State's claim to exclude the same subjects from a traditional public forum. This Court's decision in *Widmar v. Vincent, supra*, establishes that very point.

In *Widmar*, a public university adopted a policy of providing university facilities for meetings of student groups. As here, the university had no affirmative interest in the particular subject matter of these meetings. And, as here, the university purported to exclude from this forum meetings " 'for purposes of religious worship or religious teaching.' " 454 U.S. at 265. The Court began its analysis by recognizing that the university had created a public forum, albeit one limited to student groups:

> Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the

> University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place. [*Id.* at 267-68 (footnote omitted).]

The Court then stated the standard the university was required to meet in order to justify exclusion of religious speech from the limited public forum at issue:

> In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. [*Id.* at 269-70.]

Finally, the *Widmar* Court stated its holding as follows:

> Having created a forum generally open to student groups, the University seeks to enforce a content-based exclusion of religious speech. Its exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral, and the University is unable to justify this violation under applicable constitutional standards. [*Id.* at 277; *see also Board of Educ. of Westside Community Schs. v. Mergens*, *supra*, 496 U.S. 226.]

In *Widmar*, the nature of the government interest being pursued was such that it was proper to limit the public forum to student organizations and to close the forum to the general public. In all other respects, the public forum created there is analytically the same as the public forum created here. As in *Widmar*, then, the State's express exclusion of religious teachings from the forum here cannot define the forum for constitutional purposes.

In both instances, there is no nexus between the purported restriction on speech and the reasons that led the State to create the forum. The State's interest in creating a forum for undirected expression by nongovernment speakers simply provides no principled basis for excluding specific subject matters from that forum.

CONCLUSION

For the above stated reasons, the Court should reverse the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,

Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO, in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK ATTORNEY GENERAL'S OFFICE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICUS CURIAE OF THE CHRISTIAN LEGAL SOCIETY, THE UNITED STATES CATHOLIC CONFERENCE, THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE FAMILY RESEARCH COUNCIL, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, THE NATIONAL ASSOCIATION OF EVANGELICALS, THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE HOME SCHOOL LEGAL DEFENSE ASSOCIATION, THE LUTHERAN CHURCH-MISSOURI SYNOD AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

The interest of each *amicus curiae* is set forth in the appendix hereto. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

This case is a remarkable paradigm of First Amendment violations. The government officials in this case, including the courts below, have breached the First Amendment in the following ways: violated the neutrality requirement of both the Free Exercise and Establishment Clauses; discriminated against speakers because of their religious status and religious ideas; engaged in excessive entanglement with religious doctrine; discriminated among religious viewpoints; exercised unbridled discretion in determining whether citizens' speech is religious; and enforced a content-based restriction on religious speech without a reasonable, let alone compelling, justification for its censorship.

The facts are straightforward. A governmental body refused to allow a film series to be shown because it contained religious ideas. In the film series, Dr. James Dobson, a nationally recognized child psychologist, and Mrs. Shirley Dobson, author of a book on family traditions, address a variety of issues facing the American family today, ranging from practical parenting techniques to social issues that affect families.

To determine whether the film series was "religious", a government official read a brochure about the film. Based on the brochure, the government denied permission to show the film for three specific reasons: 1) the film advocated "a loving home where Christian values are instilled from an early age"; 2) in one part, Mrs. Dobson "recall[ed] the influences which brought her to a loving God"; and 3) Mrs. Dobson "has been active in a variety of Christian endeavors." (Trial transcript, hereinafter "Tr." at 65-66 (test. of Alice Schoener).)

The school district does not claim that it denied access for pedagogical reasons or because the community group posed any threat of disruption. Instead, the school district claims that state law left it no discretion but to deny access to the film series. (Br. of Def.-Resp't [School District] in Op. to Pet. for Cert. at 3, 8.)

The refusal to allow the film series to be shown violates the First Amendment in a multitude of ways. Most importantly, a policy that facially discriminates against religious persons and their expression violates the core requirement of the Religion Clauses that the State treat religion with neutrality. *See generally, e.g., Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Employment Division v. Smith*, 494 U.S. 872 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). The State may not discriminate against a person because of his or her religious beliefs or religious status, as the State has openly done here. *See McDaniel v. Paty*, 435 U.S. 618 (1978).

In its discriminatory treatment of religious expression, the State not only violates the Free Exercise Clause

but also the Establishment Clause. A facially discriminatory policy necessarily has the effect of inhibiting religion and, indeed, conveys a message of hostility toward religious persons who are excluded from an expressive forum solely because their speech is religious. *See Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226, 248 (1990).

Furthermore, as this case vividly demonstrates, excessive entanglement inevitably follows from a facially discriminatory policy that requires government bureaucrats and judges to sift through various community group uses of facilities to determine which are "religious." *See, e.g., Widmar*, 454 U.S. at 272 n.11; *Mergens*, 496 U.S. at 253. The record in this case discloses several alarming spectacles: a school district clerk pouring over a brochure to determine whether a film is religious; a federal district judge "knowing" that the Salvation Army is not religious because of the "kind of names" on its board of directors and the fact that he personally knows some of them "as non-Christians," (Tr. at 46-47); and federal appellate judges deciding what activities are and are not "religious in any meaningful way." (Pet. App. at 14a.) Such actions by local officials and federal judges are a parody of the First Amendment.

This sifting of uses to determine which are religious also fosters discrimination *among* religious viewpoints, another important Establishment Clause prohibition. *See Larson v. Valente*, 456 U.S. 228, 244-246 (1982). Parallel to these Establishment Clause concerns, the Free Exercise and Free Speech Clauses prohibit government officials' unbridled discretion to determine whether citizens'

speech is religious. *See Cantwell v. Connecticut*, 310 U.S. 296, 305-307 (1940).

A facially discriminatory policy also violates the core of the Free Speech Clause. The school district's denial of equal access is a content-based restriction on religious speech in a designated public forum, indistinguishable from the university policy struck down in *Widmar*.[1] The school district through policy and practice has set aside the school facilities during specified nonschool hours for community groups to use. Its stated reason for denial of access to show the film series is that the film contains religious content. No compelling state interest supports this ban, given that equal access for private religious speakers to a forum does not violate the Establishment Clause but instead avoids potential violations of the Free Speech, Free Exercise, and Establishment Clauses. *Mergens*, 496 U.S. at 250; *Widmar*, 454 U.S. at 273; *see also*, *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951). Moreover, even if this were a nonpublic forum, which the court below expressly found it was not, (Pet. App. at 9a), the government may not deny access based on a speaker's religious viewpoint. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). For example, although it banned this film series on family issues from an evangelical Christian perspective, the school district has permitted a family counseling service, affiliated with a religious group, to

[1] As in this case, the university did not deny access to the religious group but conditioned access on the group agreeing not to use the university facilities for "religious worship" or "religious teaching." *Widmar*, 454 U.S. at 265 n.3.

use school facilities for counseling sessions, board meetings, and a fundraising event. (Tr. at 29, 34 (test. of Ruth Bragarnick).)

Once again, this Court is asked to sanction State censorship of private religious speech. In rejecting numerous past attempts to censor private religious speech, this Court has intentionally and wisely avoided the morass created by the court below, whereby State officials, including judges, determine whether citizens' speech is religious. If allowed to stand, the decision below signals "open season" for the suppression of religious speech on virtually any public property by any federal, state, or local official.

ARGUMENT

This case can be approached through two distinct, yet parallel, lines of precedent – either through public forum analysis or analysis under the Religion Clauses. Both lines of precedent compel the same result: discriminatory treatment of religious speakers and religious expression violates the First Amendment. However, analysis under the Religion Clauses offers a simpler way than the multi-tiered public forum analysis to resolve cases involving content-based exclusion of religious speech. Because public forum analysis, while favorable to Petitioners, is not necessary to decide this case, *amici* will address the violation of the Religion Clauses first.

I. A POLICY THAT FACIALLY DISCRIMINATES AGAINST RELIGIOUS SPEECH VIOLATES A CORE REQUIREMENT OF THE RELIGION CLAUSES THAT THE STATE TREAT RELIGION WITH NEUTRALITY.

A. A policy that facially discriminates against religious persons and religious expression inhibits religion in violation of the Religion Clauses.

Facially discriminatory treatment of private religious expression and private religious speakers cuts to the core of the Free Exercise and Establishment Clauses, both of which mandate state neutrality toward religion. As this Court recently emphasized in another case involving equal access for religious groups to public school facilities, "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248. As this Court has reiterated in both free exercise and establishment decisions, "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).[2]

Both Religion Clauses prohibit the State from singling out private religious expression for censorship. As

[2] Neutrality has been a common thread throughout otherwise diverse cases. *See, e.g., Weisman*, 112 S.Ct. at 2656 (1992); *Smith*, 494 U.S. 872 (1990); *Texas Monthly v. Bullock*, 489 U.S. at 8-9 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985); *Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981); *McDaniel*, 435 U.S. at 629 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *Board of Educ. v. Allen*, 392 U.S. 236, 242 (1968); *Everson v. Board of Educ.*, 330 U.S.1, 18 (1947).

this Court recently reaffirmed, "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Weisman*, 112 S.Ct. at 2656. The school district's policy, which bans use "by any group for religious purposes," (Pet. App. at 57a), lacks the facial neutrality that the Religion Clauses require.[3]

Under the Free Exercise Clause, the State may not prohibit otherwise permitted acts "only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Smith*, 494 U.S. at 877. The school district policy is the hypothetical law condemned in *Smith*. Rather than prohibiting the "casting of 'statues that are to be used for worship purposes,' " *id.* at 877-878, the school district has prohibited access for "religious purposes," and banned this film, which, but for its religious content, would be permitted.

Similarly, if the permissibility of a use depends upon a citizen's motives, religious motives must be included among the motives that are legally permitted. *See Smith*, 494 U.S. at 884, ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons"). The state allows community groups access to school facilities during specified nonschool hours for a

[3] The facial neutrality at issue in this case does not require the Court to revisit the issue of whether a substantive definition of neutrality requires exemption for religious objectors to facially neutral, generally applicable laws. *See generally*, Laycock, *Formal, Substantive, and Disaggregated Neutrality toward Religion*, 39 DePaul L. Rev. 993 (1990).

broad variety of reasons, including "social, civic and recreational . . . and other uses pertaining to the welfare of the community", New York Education Law Section 414(c) (McKinney 1988 and Supp. 1992) (Pet. App. at 52a), yet singles out religion for direct discriminatory exclusion. But religion may not be excluded from the broad universe of "uses pertaining to the welfare of the community."

Nor may the school district prohibit the film because one of its featured speakers "has been active in a variety of Christian endeavors." (Tr. at 66 (test. of Alice Schoener).) It is a cornerstone of free exercise jurisprudence that "[t]he government may not . . . impose special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877 (citing *McDaniel*, 435 U.S. 618 (1978)).

A facially discriminatory policy violates the standards set forth in this Court's Establishment Clause decisions as well. "The core notion animating the requirement that a statute possess a secular legislative purpose and that its principal or primary effect be one that neither advances nor inhibits religion is . . . that government may not be overtly hostile to religion. . . . " *Texas Monthly*, 489 U.S. at 9 (plurality opinion) (quotation and citation omitted). A policy that facially discriminates against religion strongly evinces a governmental purpose to "disapprove of religion". *Cf., e.g., Jaffree*, 472 U.S. at 56; *id.* at 75 (O'Connor, J., concurring) (statute facially invalid because facial inclusion of prayer suggests the "primary purpose of endorsing prayer").

Enforcement of a facially discriminatory policy necessarily has a primary effect of inhibiting religion. While the state may not single out religious expression for special benefits, *Texas Monthly*, 489 U.S. at 15, neither may it single out religious expression for special disadvantage. *See, e.g., Widmar*, 454 U.S. at 276.

Furthermore, a facially discriminatory policy sends a message to religious persons that they are outsiders in the community due to their religious views. As this Court stated in *Mergens*, "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." 496 U.S. at 248. *Accord* L. Tribe, *American Constitutional Law* 1175 (2d ed. 1988). By denying use of its auditorium to a film series on family issues solely because it contains religious viewpoints, the school district is informing religious adherents in the community that their views do not "pertain to the welfare of the community" (Section 414(c)), simply because their ideas are religious in nature. This impermissible message from the State to its citizens "is itself a signal of persecution. It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." J. Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), 5 *The Founders' Constitution*, at 83. *See also*, Locke, "A Letter Concerning Toleration," 35 *Great Books of the Western World* 13 (Robert Hutchins ed. 1952) ("Whatsoever is permitted unto any of [the magistrate's] subjects for their ordinary use, neither can nor ought to be forbidden by him to any sect of people for their religious uses.")

B. The school district policy creates unavoidable excessive entanglement of state officials with religious doctrine.

In addition to its facial invalidity, enforcement of a ban on religious expression creates an Establishment Clause nightmare, due to the resulting excessive entanglement between state officials and religious doctrine. Determining whether private speech is religious "could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *Widmar*, 454 U.S. at 272 n.11 (citation and quotation marks omitted). Moreover, as this Court has warned, "a denial of equal access to religious speeeh might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur." *Mergens*, 496 U.S. at 253, (citing *Widmar*, 454 U.S. at 272 n. 11.)

This case confirms the worst fears concerning excessive entanglement. The school district clerk, who first reviewed applications for use of facilities, admitted in her letter of January 18, 1989, to Petitioner:

> "Fortunately, we have not, to date, been put to the test of determining when a use of the facility by one of our local churches would constitute 'religious purposes.' I am hard pressed to determine from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations."

(Jt. App. at 81.) She then requested "a more detailed description of your proposed use (including a brochure describing the film)." *Id.*

After examining the brochure, the clerk denied the request because "[t]his film does appear to be church related." (Jt. App. at 84.) At trial, the clerk specified three reasons why the district determined from the brochure that the film could not be shown: 1) the film advocated "a loving home where Christian values are instilled from an early age"; 2) in one part, Mrs. Dobson "recall[ed] the influences which brought her to a loving God"; and 3) Mrs. Dobson "has been active in a variety of Christian endeavors." (Tr. at 65-66 (test. of Alice Schoener).)[4]

The clerk's determination of "religious purpose" is only the beginning. The federal district judge, following Second Circuit precedent, was required to determine whether any previous group had used the facilities for a religious purpose.

Lamb's Chapel suggested several groups that seemed to have used the school facilities for an apparently religious purpose, including: the Salvation Army in a joint concert with the high school band at which an invocation was given and some religious music was played; a gospel

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[4] The school district may attempt to downplay its entanglement with religion by suggesting that little entanglement actually occurs because the prohibition on religious use is not vigorously enforced. The use of facilities by several groups for arguably religious purposes was unquestioned by the school district administration, as discussed *infra*, at pp. 28-29. However, failure to enforce consistently a policy that requires line-drawing between religious and nonreligious expression does not avoid violation of the excessive entanglement prohibition. Such an argument was rejected in *Texas Monthly* because it was still "open to future administrators to subject the content of religious publications to more exacting scrutiny." 489 U.S. at 20 n.9.

singing group, whose business manager testified as to the religious content of the music and the purpose of gospel music "to spread the good news about God;" and Dr. Jerry Huck, who expounded on parapsychology and Eastern mysticism in a series of lectures sponsored by the public library at school facilities.[5] (Pet. App. at 12-13a; 20a; 46a.)

In order to determine whether any prior use had been religious, the Court heard testimony from a number of witnesses, including a Salvation Army spokesperson, the business manager for the gospel singers, library series lecturer Dr. Jerry Huck, a person who attended two of Dr. Huck's lectures[6], and two expert witnesses on religion, specializing in cults and New Age religions. The district judge determined that Petitioners had not proved that any of the prior uses had been religious. (Pet. App. at 31a.)

The criteria that the judge used in determining whether a use was religious are the essence of excessive entanglement. For example, in attempting to determine whether the Salvation Army is religious, the judge

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[5] The Family Counseling Services sponsored by the Hampton Council of Churches used the school facilities over a period of time for counseling sessions, board meetings, and other uses (Tr. at 29-34 (test. of Ruth Bragarnick)), which would seem indistinguishable from a film series on family issues from a Christian perspective. A representative testified but the judge did not specify why its use was not religious.

[6] The witness testified that Dr. Huck denied in a lecture the truth of certain foundational beliefs of Christianity, such as the Deity of Jesus. (Tr. at 98 (test. of Rudolph Blaum).)

engaged in the following interchange with a Salvation Army administrator (Tr. at 46-47):

> "THE COURT [looking at a press release by the Salvation Army concerning the concert]: Do you consider the Salvation Army the Patchogue service unit, non-sectarian or sectarian?
>
> "THE WITNESS: I'm sorry, you are asking me?
>
> "THE COURT: Yes.
>
> "THE WITNESS: Non-sectarian.
>
> "THE COURT: In fact looking down the list of the chairman and the members of the board, I see all kind of names there.
>
> "THE WITNESS: Yes, it's totally volunteer.
>
> "THE COURT: And some of them I know as non-Christians.
>
> "THE WITNESS: Yes, sir.
>
> "THE COURT: If you want the Court will exemplify who I know on the list that is listed as the board of directors on the page, the middle, anyway.
>
> "MR. INFRANCO [co-counsel for plaintiffs]: It's not necessary, Your Honor.
>
> "MR. TRABOLD [co-counsel for defendants]: Not necessary, Your Honor."

The Second Circuit had similar problems determining the "religiousness" of the Salvation Army, gospel singers, and the lecturer on parapsychology and mysticism. In the end, it determined that even though there were "incidental" mentions of religion, there was "no religion in a meaningful way." (Pet. App. at 14a.)

Federal judges should not be making such inquiries. As the above interchange demonstrates, determinations as to whether a use is religious invite unintentional, but nevertheless unconstitutional, imposition of the personal religious biases of the judges. It is hard to "imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible." *Weisman*, 112 S.Ct. at 2671 (Souter, J., concurring) (nonpreferentialist interpretation of Establishment Clause would require judgments about religion). *See Smith*, 494 U.S. at 889 n.5 (judges should not regularly weigh the significance of religious practices); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987); *Widmar*, 454 U.S. at 269 n.6 (judiciary not competent to draw line between "religious worship" and "religious speech").

As this case demonstrates, allowing government officials to determine whether speech is religious provides fertile ground for discrimination among religions, which the Establishment Clause prohibits. *See Larson v. Valente*, 456 U.S. 228 (1982). Officials' responses to requests for access may depend on their "comfort with mainstream religious views and discomfort with and perhaps hostility towards non-mainstream, non-traditional religious messages." *Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 693 (2d Cir. 1991) (access request by evangelical Christian speaker) (quotation marks omitted).

The safest route around the morass created by the decision below is the high ground this Court has already taken in *Widmar* and *Mergens*. A policy of equal access for religious expression is the best means of avoiding excessive entanglement of state officials in the thicket of religious doctrine.

C. The school district policy and state law grant unbridled discretion to a government official to license religious speech.

As this case demonstrates, enforcement of a facially discriminatory policy requires that government officials determine whether private citizens' speech is religious. Yet, over fifty years ago, this Court held that a government official could not exercise unbridled discretion to determine whether private citizens' speech was religious. *Cantwell v. Connecticut*, 310 U.S. 296, 305-307 (1940).

Inability to articulate a consistent standard epitomizes the unbridled discretion condemned in *Cantwell*. However, the school district has failed to articulate any standard for determining when its ban on "religious purposes" is violated. The policy prohibits use "by any group for religious purposes," but the school district clerk admitted that she had *no standard* by which to determine what speech would constitute a "religious purpose." In her January 18, 1989, letter to Petitioner, she said:

> "Fortunately, we have not, to date, been put to the test of determining when a use of the facility by one of our local churches would constitute 'religious purposes.' I am hard pressed to determine, from your description, what the five-part movie would represent, but suspect that it would certainly have religious connotations."

(Jt. App. at 81.) Yet at trial, when asked whether "religious connotations" was the standard for the school district, the clerk responded: "This is a one-time event, so I would hesitate to say that that was the standard, a standard for the District." (Tr. at 63-64 (test. of Alice

Schoener).) In her February, 1989 letter, to Petitioner, permission was denied because the film was "church related". (Jt. App. at 84.) Yet, at trial, she admitted that churches were permitted to use facilities for recreational or athletic purposes. (Tr. at 69-70 (test. of Alice Schoener).)

Thus, the school district policy, both on its face and in its application, violates nearly every precept of the Religion Clauses. Government action that abandons the neutrality mandated by both Religion Clauses, that sends a message of hostility to religious citizens, and that entangles government officials and judges in subjective theological determinations, is unconstitutional.

II. DENIAL OF ACCESS IN THIS CASE TO A COMMUNITY GROUP WISHING TO SHOW A FILM SERIES WITH RELIGIOUS CONTENT VIOLATES THE FREE SPEECH CLAUSE.

A. The decision below contradicts this Court's decisions protecting citizens' religious speech against content-based censorship.

Content-based restrictions on religious speech have never been upheld by this Court. *See Mergens*, 496 U.S. 226; *Widmar*, 454 U.S. 263 (1981); *Fowler*, 345 U.S. 67; *Niemotko*, 340 U.S. 268. While a state may not give religious speech special advantages, *Texas Monthly*, 489 U.S. at 15, neither may it impose special disabilities on it. *See, e.g., Widmar*, 454 U.S. at 270.

The school district policy in this case is irreconcilable with this Court's decision in *Widmar*. As in this case, the university in *Widmar* did not deny *all* access to religious

groups but *conditioned* access upon the group agreeing not to use the university facilities for "religious worship" or "religious teaching." 454 U.S. at 265 n.3. The Court said state officials could not enforce such a ban. 454 U.S. at 269 n.6. While the school district relies on a state education law to justify the ban, the university claimed that its ban was required by the state constitution's stringent "establishment clause." The Court said that the free exercise and free speech claims of the group outweighed the state's interest in enforcing a purportedly more stringent state establishment clause. 454 U.S. at 276. As in *Widmar*, the school district through policy and practice has set aside the school facilities during certain nonschool hours for groups to use for expressive purposes. See pp. 19-24, *infra*. No compelling state interest supports the ban. Instead, as in *Widmar*, a policy of equal access avoids potential violations of the Free Speech, Free Exercise, and Establishment Clauses. *Widmar*, 454 U.S. at 271-275; *Mergens*, 496 U.S. at 252-253.

In the decade before this Court's decision in *Widmar*, a national trend began in which many government officials misconstrued the Establishment Clause to *require* censorship of private citizens' religious speech on public school property. *See Mergens*, 496 U.S. at 239. This case is a throwback to that pre-*Widmar* trend, in which New York state and federal courts were leaders.

In the decision which is at the root of the school board policy in this case, *Trietley v. Board of Educ. of City of Buffalo*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (App. Div. 1978), an intermediate New York state court interpreted Section 414 not to authorize school officials to allow students to meet before or after school on high school property for

religious speech, because "[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414," *id.*, 409 N.Y.S.2d at 915, noting that the federal Establishment Clause would be violated if such meetings were allowed.[7]

The following year, the Second Circuit prohibited equal access for student meetings for religious speech before and after school. *Brandon v. Board of Education of Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). Largely in reaction to the *Brandon* decision and its ensuing negative influence on school admininstrators and other courts across the nation, Congress passed the Equal Access Act in 1984. *Mergens*, 496 U.S. at 239.

[7] It is troubling that the *Trietley* decision should continue to work such mischief to federal first amendment rights. It is not a decision of a state court of last resort. Its construction of Section 414 consisted of only conclusory statements with no supporting analysis, despite the plain language of the statute that would seem to allow religious uses. N.Y. Educ. 414(c) ("social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community"). The construction may be the result of the lower state court following the familiar rule of construction that statutes should be construed to avoid constitutional issues if at all possible. In 1978, a state judge could have believed that construing Section 414 not to allow religious uses avoided difficult, unresolved conflict between free speech and establishment clause concerns. However, the intervening decisions in *Widmar* and *Mergens* would now require a different construction of Section 414, its natural reading, in order to avoid constitutional problems.

The effects of these two cases continue to haunt religious speakers in the Second Circuit.[8] In clinging to the *Trietley* and *Brandon* premises that religious speech can be singled out for discriminatory treatment, the Second Circuit has created an irreconcilable contradiction within its own opinions: all religious uses of school facilities are prohibited – unless previous religious uses have been allowed by school administrators. *Deeper Life Christian Fellowship v. New York City Bd. of Educ.*, 852 F.2d 676, 680 (1988). In effect, the Second Circuit recognizes the practical unworkability of a discriminatory ban on religious speech but refuses to abandon the futile effort.

B. By policy and practice, Center Moriches school facilities are a designated public forum during specified nonschool hours for use by community groups.

This Court has defined three categories of publicly owned property: 1) traditional public forum, 2) designated public forum, and 3) nonpublic forum. *See International Soc. for Krishna Consciousness v. Lee*, 112 S.Ct. 2701, 2705 (1992) ("Lee"). The school facilities in this case have

[8] Although no longer good law for the named school district, (*see Board of Educ. of the City of Buffalo v. Burr, et al.*, Index No. 11097/88, order by Judge Leo J. Fallon (Sup. Ct. September 4, 1991) (permanent injunction against school district requiring it to allow student Bible study club to meet under Equal Access Act)), the *Trietley* ruling is still used elsewhere to deny school districts discretion to allow religious uses of school facilities during evening and weekend hours by community groups. (Br. for Resp't Att'y Gen. in Op. to Pet. for Cert. at 2; Br. of Def.-Resp'ts [School District] in Op. to Pet. for Cert. at 8.)

been opened during specified nonschool hours for expressive uses by a broad variety of community groups under state law and the practice and policy of the school district and, therefore, constitute a designated public forum.

The Second Circuit correctly determined that the school facilities at issue here "do *not* fall within the categor[y] of . . . 'non-public forum'. . . . " (Pet. App. at 9a (emphasis added).) The school district itself admits the facilities are *not* a nonpublic forum:

> [T]he Center Moriches Union Free School District pursuant to the provisions of Section 414 . . . have (sic) *established a limited public forum* restricting the use of the school district facilities to cultural and educational activities consistent with the school district's preservation of the facilities for school related business *and the welfare of the community* rather than the promotion of a private expression or purpose.

(Br. of Def.-Resp'ts [School District] in Op. to Pet. for Cert. at 3 (emphasis added)); *see also*, Section 414(c) ("social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community").[9]

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[9] *Amici* do not argue that the school facilities are a designated public forum during school hours or at times when the school chooses to close the facilities under content-neutral regulations pertaining to the time, place and manner of expression. Rather the focus is on the use of designated school facilities during specified nonschool hours by community groups. *See, e.g., Perry Educ. Asss'n v. Perry Local Educators' Ass'n*, 460 U.S. at 44 (focusing on whether school's internal mail system and

This case differs from the Court's recent nonpublic forum cases in that the school district has offered essentially *no* reason for regarding religious uses as different from other "social, civic, and recreational meetings and entertainments, and other uses pertaining to the welfare of the community." The showing of the film series on family issues certainly seems to fall within the broad language of Section 414(c) and the school district policy.

The school district simply asserts its own circular definition of the forum: a use is not included in the forum if the school district has said it is not included. But having opened their facilities to a broad range of uses, the school district and state cannot now claim that their singling out of religious uses for exclusion is merely a matter of "defining the forum." The category of a designated public forum cannot be so easily manipulated out of existence. Indeed, under the school district's standard, the university's policy of excluding religious groups in *Widmar* would have been permissible: the university could have "defined" its forum as permitting all uses except religious ones, and the forum would "remain nonpublic except as to the specified uses," (Pet. App. 10a): that is, nonpublic as to religious uses.

The facilities and forum here are fully compatible with, and indeed conducive to, expressive activity. The school district has opened the school facilities as a meeting place for community groups for a variety of expressive uses, as in *Widmar*. Because the school facilities are

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teachers' mailboxes, as opposed to entire school, constituted a public forum).

made available only in evening hours, long after classes are over, such uses will not disrupt the educational purposes of the school. Because groups using the facilities meet in separate rooms and are allowed use only on an orderly first-come, first-served basis, it is unlikely that one group's activity will interfere with another group's use.[10]

For these reasons, this case is sharply different from those in which the Court has determined that a forum was nonpublic. *See, e.g., United States v. Kokinda*, 110 S.Ct. 3115, 3119 (1990) (quoting *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1973) ("Here, we have no open spaces, no *meeting hall*, park, street corner, or other public thoroughfare.") (emphasis added). Municipal airports, for example, are "commercial establishments," and "nearly all who visit [them] do so for some travel related purpose." *Lee*, 112 S.Ct. at 2707. Sidewalks leading up to the entrances of post offices may be "constructed solely to provide for the passage of individuals engaged in postal business." *Kokinda*, 110 S.Ct. at 3120. The federal government may regulate fundraising drives in the federal workplace "in order to avoid interruptions to the performance of the duties of employees" that might result. *Cornelius v. NAACP Legal Defense and Ed. Fund*, 473 U.S. 788, 805-806 (1985). A school district may restrict access to an internal mail system used to communicate with its employees, especially to preserve labor peace, *Perry*, 460

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[10] Of course, the school may deny access to groups that would cause a disruption. *Mergens*, 496 U.S. at 241; *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 509 (1969).

U.S. at 50 (1983), or create and subsidize a school newspaper as part of its curriculum for pedagogical purposes. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988). In each of these cases, the asserted forum for expressive activity would overlap, and potentially interfere, with the primary uses to which the government had dedicated the property. Hence, in restricting expression, "the government [was] acting as a proprietor, managing its internal operations." *Lee*, 112 S.Ct. at 2705.

By contrast, during *evening* hours – the relevant time for purposes of analyzing this case – those who visit Center Moriches schools do so only to participate in the forum that the school district has created.[11] Nothing in the record shows any incompatibility between evening use of the school for expressive activity and its daytime use for educating students. As such, by opening facilities in the evening to many uses but not to religious ones, the school has acted not as proprietor, but "as lawmaker with the power to regulate or license." *Lee*, 112 S.Ct. at 2705.

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[11] Importantly, the expression in this case is among people who want to receive the ideas conveyed by the film series. *Cf., Lehman*, 418 U.S. at 302 ("The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice.") (citation omitted). The voluntary nature of the audience in this case contrasts with the unwilling recipients of solicitation in recent public forum cases. *See, e.g., Lee*, 112 S.Ct. at 2708 (noting "the disruptive effect that solicitation may have" on others); *id.* at 2713 (O'Connor, J., concurring); *id.* at 2721 (Kennedy, J., concurring); *Kokinda*, 497 U.S. at 733-34 (solicitation "is more intrusive and intimidating than an encounter with a person giving out information"); *Cornelius*, 473 U.S. at 805, 809-10 (purpose of Combined Federal Campaign to limit disruption of federal workplace that frequent solicitations were causing).

The school district claims that it is enforcing a ban on classes of speakers or entire topics of speech, but it is not. It has not restricted use of school facilities during non-school hours only to school-related groups or to school-related topics. *See Perry*, 460 U.S. at 45 n.7 ("A public forum may be created for a limited purpose such as use by certain groups, *e.g.*, *Widmar v. Vincent* (student groups), or for the discussion of certain subjects, *e.g.*, *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n*, (school board business).); *id.*, 460 U.S. at 41, 53 (1983) (noting that exclusive access policy did *not* apply to "meetings on school property after school hours"). Instead, the school district has opened its facilities to groups from the community as a whole. The school district has not banned such subject matter as family issues or parenting techniques. Instead, the record demonstrates religious groups have used the facilities for recreational and other uses, (Tr. at 69 (test. of Alice Schoener)), and that a family counseling service, affiliated with a religious group, used the school facilities for counseling sessions, board meetings, and a fundraiser. (Tr. at 34 (test. of Ruth Bragarnick).)

The lower court correctly concluded that the school district has created a designated public forum. It was incorrect in its conclusion that the school district has applied either a subject matter or speaker classification in prohibiting the film series.

C. The school's discriminatory suppression of religious speech is not narrowly tailored to achieve any compelling state interest.

In *Lee*, the Court also reaffirmed its admonition that regulation of a designated public forum "is subject to the same [stringent] limitations as those governing a traditional public forum." 112 S.Ct. at 2705 (citing *Perry*, 460 U.S. at 46). As this Court stated in *Widmar*, the school "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." 454 U.S. at 270.

The state and school district do not really attempt to justify their ban on religious expression. They simply assert that they can have such a ban. They do not, because they cannot, seriously assert that the Establishment Clause prohibits equal access to public facilities for private citizens' religious expression. *See Mergens*, 496 U.S. at 252-253; *Widmar*, 454 U.S. at 271-275.[12]

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[12] Indeed, any argument by the school district or state that it may or must avoid association with private religious activity is even weaker than the argument that the Court rejected in *Mergens*. There the school district claimed that permitting *student* religious meetings on the same terms as other student groups would communicate school endorsement of the religious activity, largely because (it was claimed) "the student religious meetings are held under school aegis, and because the State's compulsory attendance laws bring the students together." *Mergens*, 496 U.S. at 249. The Court rejected these arguments because meetings took place during "noninstructional time" and involvement by school officials was limited to "custodial oversight." *Mergens*, 496 U.S. at 251, 253; *id.* at 261 (Kennedy, J., concurring).

Nor can compliance with a state law, as construed by a lower state court to require discrimination, justify censorship of religious speech. *See Widmar*, 454 U.S. at 276 (state constitutional establishment concerns did not justify censorship of private religious speech); *McDaniel*, 435 U.S. 618 (striking down state constitutional provision that discriminated against religious persons).

D. Denial of access for the film series because it contained religious content is impermissible viewpoint discrimination and lacks any reasonable justification.

Even if this case did not involve a designated public forum, "restrictions on speech in nonpublic fora are valid only if they are 'reasonable' and 'not an effort to suppress expression merely because public officials oppose the speaker's view.' " *Lee*, 112 S.Ct. at 2712 (O'Connor, J., concurring) (citing *Perry*, 460 U.S. at 46). Nor may the restriction "be arbitrary, capricious, or invidious." *Lehman*, 418 U.S. at 303.

1. *Discrimination against religious viewpoints.* By forbidding use of school facilities "for religious purposes," the school district has discriminated against religious

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Furthermore, undermining any argument that the school was concerned about violating the Establishment Clause is the fact that the school district allowed the Salvation Army Band to present a joint concert with its high school band and allowed a speaker to address metaphysical issues in a lecture series sponsored by the public library. This is not to say whether these uses violated the Establishment Clause, but that if Establishment Clause enforcement were the school district's concern, these other uses should have raised greater concerns.

viewpoints in relation to other viewpoints. The film series, which addresses family issues and discusses parental techniques, undoubtedly fits within the definition of "social, civic . . . and other uses pertaining to the welfare of the community." Nevertheless, it was excluded on the ground that it represented a religious viewpoint on those issues. Had Petitioners sought to show a film addressing the same subject but lacking a religious viewpoint, their application would have been approved. Such a distinction is viewpoint discrimination.

The court below and the Respondents have claimed that religion is merely a subject outside the subject matter of the forum and, therefore, excludable. But in the circumstances presented here, and in many others, "religion" is more than a "subject matter" that can be isolated from other subjects such as the "welfare of the community." Religion provides a viewpoint on a wide range of topics concerning how human beings can and should live together in communities. In other words, religion constitutes a viewpoint on a great many "social," "civic," and other issues "pertaining to the welfare of the community" – including, as in this instance, issues concerning effective means of raising families.

The position that religion is simply a separate "subject matter" from such social issues privatizes religion and denies its relevance to social and civic matters. Such a position is entirely at odds with our constitutional history and traditions. *See, e.g., Walz v. Tax Commission*, 397 U.S. 664, 670 (1970); *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting); *McDaniel*, 435 U.S. at 641

& n.25 (1978) (Brennan, J., concurring). By defining religion as separate from social and civic issues, and excluding religious viewpoints from the forum on that basis, the school district skews public discussion of issues, such as family and parenting, by excluding religious viewpoints.

2. *Discrimination among religious viewpoints.* The school policy excluding "religious purposes," as applied by Respondents and the court below, has discriminated between religious viewpoints. As already discussed, the family counseling service, affiliated with a local council of churches, was permitted to use school facilities, but Petitioners were not permitted to express their religious viewpoint on family issues.

Similarly, the school district discriminated between religious viewpoints by permitting uses such as the Salvation Army Band joint concert with the high school band and the Southern Gospel Harmonizers' performance of religious songs. Petitioner presented evidence that " 'the Salvation Army is a church or a quasi-church,' " (Pet. App. at 12a)[13], and that the gospel singing group, whose business manager testified that gospel music was "the good news of God," sang a number of religious songs. (Pet. App. at 12-13a.) The Boy Scouts meet regularly in the school facilities.[14] The public library sponsored a speaker in the school facilities who addressed

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[13] *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972).

[14] *See Welsh v. Boy Scouts of America*, 787 F.Supp. 1511, 1515-1518, 1521 n. 23 (N.D. Ill. 1992) (district court findings as to important part religion fulfills in the scouting program, in civil rights lawsuit challenging Scouts' requirement that all members affirm a belief in a Supreme Being).

"Eastern mysticism" and other religious topics. (Pet. App. at 20a.)

Governmental distinctions between "meaningful" and "merely incidental" religious uses constitute discrimination against viewpoints that are more overtly religious. Presumably, had Petitioners eliminated or "soft-pedaled" the religious content of their presentation on the family, they would have stood a better chance of surviving the school district's inquiry into the purpose of their meeting. But the state may not, consistent with the First Amendment, review the content of private speech to determine whether it is "too religious," *see Cantwell*, 310 U.S. at 305, or give preferential access to some religious groups but not others. *See Valente*, 456 U.S. at 244-246.

3. *No reasonable justification.* At the least, the Court has "required some explanation as to why certain speech is inconsistent with the intended use of the forum." *Lee*, 112 S.Ct. at 2714 (O'Connor, J., concurring in the judgment). The school district and the state have offered no explanation why activity by a religious group speaking to questions of family and parenting is inconsistent with the intended use of its forum.

To justify the ban, the school district and state must claim that religious uses *per se* cannot be for "social" or "civic" purposes and cannot "pertain[] to the welfare of the community." Such a thesis is so plainly arbitrary and invidiously anti-religious that it cannot serve as a reasonable justification even in a nonpublic forum. *See McDaniel*, 435 U.S. at 628-29 (plurality opinion); *Widmar*, 454 U.S. at 280-281 (Stevens, J., concurring).

Under this Court's precedents, from *Cantwell* to *McDaniel*, *Widmar* to *Mergens* and *Weisman*, the school district policy violates the First Amendment mandate that government must be neutral in its treatment of religion and may not discriminate against private citizens' religious speech. Once again, religious persons are compelled to look to this Court to protect them from discriminatory censorship of their speech.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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November 19, 1992

APPENDIX

Statement of Interest

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,000 Christian attorneys, judges, law students and law professors with chapters in every state and at 100 law schools. Since 1975, the Society's legal advocacy and information arm, the Center For Law and Religious Freedom, has advocated both in this Court and in state and federal courts throughout the nation for the protection of religious speech and exercise.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration Of Independence, 1 Stat. 1 (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which being religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its

full and free exercise. Indeed, the Declaration states that citizens have a duty to rebel and establish a new government if this right (or any other inalienable right) is abridged by the state. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom is "Congress shall make **no** law. . . . "

The U.S. Catholic Conference. The Roman Catholic Church, the largest religious denomination in the United States, has over 57 million adherents in 20,000 parishes throughout the country. All active Catholic Bishops in the United States are members of the United States Catholic Conference ("Conference"), a non-profit corporation organized under the laws of the District of Columbia. The Bishops' Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, criminal justice, and the economy. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people throughout the United States. The preservation of religious liberty through the proper interpretation of the First Amendment is one of the most important values that the Conference seeks to promote through its participation in litigation.

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the establishment and free exercise clauses is essential to religious liberty for all

Americans. The BJC's members include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

Family Research Council conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, organized to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. The League is committed to ensuring the American people's continued enjoyment of the protections afforded religious freedom by the First Amendment to the Constitution, and it supports the religious freedom rights of Catholics and others through a wide range of activities.

The National Association of Evangelicals is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The Southern Baptist Convention is the nation's largest Protestant denomination, with over 15.2 million members in over 38,200 autonomous local churches. The Christian Life Commission ("CLC") is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. The CLC seeks to advocate positions consistent with Southern Baptist convictions by filing briefs as *amicus curiae* in litigation important to these values, such as this case.

The Home School Legal Defense Association is a national organization located in Paeonian Springs, Virginia. HSLDA was formed in 1983 and currently has over 27,000 families as members. The goal of HSLDA is to provide legal defense to protect and defend the rights of parents who choose to home educate their children. HSLDA attorneys have been involved in dozens of home school cases and have assisted in resolving thousands of legal contacts over the nation. HSLDA supports the constitutional right of religious speakers to have equal access to open forums.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eleventh largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The Synod, on behalf of its congregations and individual members, is concerned with situations in which individuals' freedom to exercise their religion is infringed and in which government attempts to define religion, such as in the instant case.

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IN THE
Supreme Court of the United States
October Term, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,

Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO, in her official capacity as President of the Board of Education of Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*

The National Jewish Commission on Law and Public Affairs ("COLPA") is a national organization of volunteer lawyers and social scientists dedicated to combating all

forms of religious prejudice and discrimination and to representing the position of the nation's Orthodox Jewish community before courts, legislatures, and other governmental bodies.[1] Over the past quarter century,

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[1] COLPA has represented the full range of major national rabbinic, congregational, and educational organizations within the Orthodox Jewish Community. These include, and this brief is submitted on behalf of, the following:

a. Agudath Israel of America;
b. National Council of Young Israel;
c. The Rabbinical Alliance of America;
d. The Rabbinical Council of America;
e. Torah Umesorah, National Society of Hebrew Day Schools;
f. The Union of Orthodox Jewish Congregations of America; and
g. The Union of Orthodox Rabbis of the United States and Canada.

Agudath Israel of America is a national organization with congregational and individual members with branches in major Jewish population centers throughout the country. The National Council of Young Israel is a coordinating body for more than 185 affiliated Orthodox Jewish synagogues throughout the United States. The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world with a membership in excess of 1,000. The Union of Orthodox Jewish Congregations of America is a central spokesman for over 1,000 Orthodox Jewish congregations in this country. All of the organizations on behalf of whom this brief is filed share a vital concern for the protection in America of religious liberty and freedom

COLPA has filed numerous briefs *amicus curiae* in this Court and in the nation's courts of appeals in many of the leading First Amendment cases and in other cases of importance to the Orthodox Jewish community.

This case presents an issue of particular significance to the Orthodox Jewish community - i.e., whether the Constitution permits state officials to bar from a publicly owned "limited public forum" a law-abiding citizens' group exclusively because the subject of the group's intended meeting is "religious."

Government officials must learn that the First and Fourteenth Amendments' protection for rights of free speech and free exercise of religion prohibit relegating religious speech to second-class status. In this case, the public school officials who selectively denied use of a "limited public forum" to a religiously oriented group invoked a New York state statute as grounds for their discriminatory refusal of the plaintiff's application. That singular aspect of this case makes it particularly important to this *amicus* and to the many Orthodox Jewish organizations it represents.

Jewish groups - including synagogues, religious schools and their affiliated entities - frequently need to use premises other than those which they own for large meetings, rallies, or other community activities. Publicly owned meeting rooms that have been made available to private secular organizations should be equally accessible to synagogues and religious schools even though these entities deliver a religious message. Yet the statutes and regulations that authorize the leasing or licensing of public premises frequently omit churches, synagogues, and religious groups from the enumeration of those who may be granted permission to use the public facility. And, like New York's Education Law, they do not list religious instruction as a permissible "public purpose" for which the premises

may be used.

There is, we submit, no legitimate basis in the Constitution, in America's history, or in today's society for barring religious speech from any available public forum. Particularly in a case such as this one - where the use of the public facility by the religious group raises no conceivable appearance of "endorsement" or other "symbolic union" between church and state - the Constitution condemns a government policy that prefers secular speech to religious speech and permits the former while prohibiting the latter.

There is, moreover, a second critical constitutional flaw in the local procedure approved by the court below. It appears from this record that a governmental official was empowered to make an *ad hoc* determination as to the "religious" character of the petitioners' intended use of the public school premises. Because the official vested with licensing authority "suspect[ed] that [petitioners' program] would certainly have religious connotations, " she did not grant petitioners' application the almost automatic approval for use of the public premises that had previously been granted to secular groups (and even to some groups with religious missions). Thereafter, she determined from her own viewing of the petitioners' film that it "does appear to be church related." This finding resulted in denial of the request. Such empowerment of an individual bureaucrat to search for religious ingredients in an applicant's request to utilize public property is a license for sporadic, irregular and inconsistent administration and an invitation invidiously to distinguish among applicants.

The Jewish institutions we represent fear the consequences of licensing based on individualized determinations of whether a proposed program is "church-related" or has "religious connotations." Access to government property - particularly for the purpose of free speech - should not depend on whether a government

bureaucrat believes that the program to be presented is too "religious."

ARGUMENT

I.

AN ORGANIZATION MAY NOT BE DENIED ACCESS TO A LIMITED PUBLIC FORUM MERELY BECAUSE IT IS INTENDING TO ENGAGE IN RELIGIOUS EXPRESSION

This Court very recently articulated the constitutional standard that governs regulation of a limited public forum. In *International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705 (1992), the Court stated that regulations on speech in a "traditional public forum" are "subject to the highest scrutiny" and that they "survive only if they are narrowly drawn to achieve a compelling state interest." The Court then discussed "the designated public forum, whether of a limited or unlimited character" and said that "[r]egulation of such property is subject to the same limitations as that governing a traditional public forum."

This articulation of the governing standard applies to any content-based distinction that government agents seek to make in the use of a "limited public forum." In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), this Court discussed the standards governing "public property which the State has opened for use by the public as a place for expressive activity." The Court said, with respect to this "limited public forum," that "[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be

narrowly drawn to effectuate a compelling state interest." Exclusion of religious speech is plainly a "content-based prohibition."

Access to a "limited public forum" may, therefore, be limited only to the extent that the limitation serves "a compelling state interest" and only if the regulation is "narrowly drawn." It is not enough for those who control such a forum to say, as the business manager and district clerk of the public school district did in this case, that "religious purposes" had never been a use to which the school facilities had been put. The defendants had the burden of demonstrating that putting the facilities to such a use would harm "a compelling state interest."

The court of appeals mistakenly believed that if the defendants had not previously opened their public school facility to "religious uses and purposes," they could deny the plaintiffs' application to use the premises to show a film delivering a religious message (Pet. App. 12a). The court relied, in this regard, on Section 414 of New York's Education Law, which "nowhere permitted" use of public school premises for "religious uses" and on the School District's own Local Rule No. 7 that declares "school premises shall not be used by any group for religious purposes" (Pet. App. 10a).

The statutory omission and the regulatory exhortation violate the constitutional rules that govern limited public forums as articulated recently in the *Krishna Consciousness* case and earlier in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). If New York Education Law § 414 bars all meetings in public schools for "religious purposes" it sweeps far too broadly to meet the "narrowly drawn" component of the constitutional test. And such a broad prohibition on *all* meetings for religious purposes surely cannot be said to serve "a compelling state interest."

A. A Prohibition on All Meetings Conducted for "Religious Purposes" Is Not "Narrowly Drawn."

The standard which the School District adopted in its Local Rule - which appears to be the standard utilized by the court below - is exceedingly broad. It essentially bars from use of the school's premises any and all churches, synagogues and groups whose members share a religious bond. Presumably any activity by an organization that is legally recognized under a law such as New York's Religious Corporation Law, or any organization that has in its title the words "Jewish" or "Christian" (including the American Jewish Congress and the YMCA) could be said to be serving a "religious purpose" if it sought to conduct a meeting at the Center Moriches public school. Would a Jewish organization meeting to view the film "Fiddler on the Roof" be gathering for a religious purpose? Would a Jewish cooking club that gathers to discuss kosher recipes be assembling for a religious purpose? Would a meeting of the Knights of Columbus that is called to hear a priest speak about the homeless be considered an event held for a religious purpose?

Indeed, if a church held a rally to raise funds for the homeless, such an event would appear to serve the religious purpose of the church's charitable mission. And if a synagogue held a meeting to discuss the situation of Jews in the former Soviet Union, would the gathering be viewed as having a religious purpose? Would the result be any different if the proposed discussion related to the issue of how to bring refugees from the Soviet Union to an increased level of religious observance?

We cite these examples only to prove how broadly drawn the existing standard is. If there is, in fact, any legitimate governmental interest in denying access to meetings conducted for "religious purposes" - a subject to

which we now turn--the standard used by the School District and by the Second Circuit (and, by implication, by New York's Education Law) is plainly overbroad.

B. A Prohibition on All Meetings Conducted for "Religious Purposes" Does Not Serve Any "Compelling State Interest."

We recognize that there are circumstances in which expression, including religious, at a public forum jeopardizes legitimate governmental interests. Time, place and manner restrictions on such speech may legitimately be imposed in a neutral way to implement strong state interests. A private group may not insist, for example, on using a public school auditorium for raucous events or at times when the premises cannot reasonably be made available.

Another compelling state interest is presented by the limitations imposed by the Establishment Clause. If a government agency engages in religious speech at a public forum, the identification of that sectarian expression with government may create an appearance of impermissible government endorsement. And there have been cases in which lower federal courts have barred wholly private religious speech in a public forum because the particular form of the private expression conveyed the appearance of government "sponsorship" of religion. *See, e.g., Kaplan v. City of Burlington,* 891 F.2d 1024, 1030 (2d Cir. 1989),

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[2]The Second Circuit's ruling in *Kaplan* that there was a violation of the Establishment Clause has been explicitly rejected by the Sixth Circuit in *ACLU of Kentucky v. Wilkinson,* 895 F.2d 1098, 1102 (6th Cir. 1990); *Americans United for Separation of Church and State v. City of Grand Rapids,* 922 F.2d 303, 309 (6th Cir. 1991); *Congregation Lubavitch v. City of Cincinnati,* 923 F.2d 458, 462 (6th Cir. 1991); and *Americans United for Separation of Church and State v. City of Grand Rapids,* Nos. 90-2337 and 91-1391/1448 (decided November 16, 1992).

In these circumstances, some courts have prohibited religious expression in a public forum in the ground that "[o]bservance of the constitutional mandate of the Establishment Clause may properly be characterized as a compelling governmental interest." 891 F.2d at 1030. That general principle is derived from this Court's opinion in *Widmar v. Vincent,* 454 U.S. 263, 275-76 (1981)--a decision that, while supporting the existence of a compelling governmental interest in some cases, at the same time refutes the applicability of that principle in this case.

Use by a religious group for religious purposes of public school facilities that are freely made available to secular groups raises no Establishment Clause issue. In this case, as in *Widmar v. Vincent,* it is simply untrue "that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." 454 U.S. at 273. Indeed, the School District has never even made such an argument. Its desire to keep meetings for "religious purposes" out of public school facilities seems to be aimed at reducing controversy, not at avoiding the appearance of state endorsement of any religious faith.

Moreover, exclusion of religious speech from a limited public forum constitutes prohibited discrimination against religion. As this Court said in *Board of Education of Westside Community Schools v. Mergens,* 110 S. Ct. 2356, 2371 (1990), "[I] f a State refused to let religious groups use facilities open to others, then it would be demonstrating . . . hostility toward religion." And in *McDaniel v. Paty,* 435 U.S. 618, 641 (1978), Justice Brennan said in his concurring opinion, "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities."

And, from an objective standpoint, it is clear beyond peradventure that if the petitioners are permitted to meet and show their film on the premises of the Center Moriches public school no one--not even the most misguided "reasonable observer" (*Allegheny County v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 620 (1989))--could believe that the governmental authorities are "endorsing" petitioners' faith or "disapproving" other religions.

There may be circumstances under which the use of public school facilities by a religious group so directly affects the schoolchildren attending the school that a real Establishment Clause problem is created. This Court has been particularly sensitive to the nuances of religious coercion of impressionable school-age children. *See Lee v. Weisman*, 112 S. Ct. 2649 (1992). And we agree that if a religious group sought to use public school premises during school hours (or immediately before or after school hours) in a manner that would result or appear to encourage the proselytization of schoolchildren, the school's governing authorities should be permitted to invoke the Establishment Clause to deny such use.

But that is not this case. Nor is that "compelling interest" the subject of any "narrowly drawn" law or regulation. The actual prohibition imposed by the defendants takes in much activity and many groups that present no such dangers. Hence the New York law and the School District's Rule No. 7, as applied to these petitioners, are unconstitutional under the Free Speech and Free Exercise of Religion Clauses of the First Amendment. *See Widmar v. Vincent*, 454 U.S. 263, 276 (1981) ("the state interest asserted here--in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution--is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well").

II.

CONSTITUTIONALLY OVERBROAD AUTHORITY IS DELEGATED TO THE SCHOOL DISTRICT'S ADMINISTRATORS BY A STATUTE AND RULE DENYING ACCESS FOR "RELIGIOUS PURPOSES"

A secondary--but important--constitutional objection to the process approved by the court below inheres on the extraordinary breadth of the standard under which the defendants acted in denying the petitioners' application. The responsible official of the School District made an *ad hoc* decision that the film to be shown at petitioners' proposed event was "church related" and that, on that account, the auditorium could not be used.

This is too loose a standard to be constitutionally permitted in the area of free expression. It singles out churches, synagogues and other religiously affiliated groups and subjects them particularly to an advance licensing system that is guided by no definite and understandable criteria.

This Court's decisions have firmly established the constitutional principle "that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969), and authorities there cited; *see also Forsyth County, Georgia v. Nationalist Movement*, 112 S. Ct. 2395, 2401-02 (1992). That bedrock constitutional rule is violated if a public school official is entitled, with no more specific standard than "church related" or "religious purposes," to select among groups that wish to use public facilities for private expression.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents,

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF CONCERNED WOMEN FOR AMERICA AND FREE CONGRESS FOUNDATION IN SUPPORT OF PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICI CURIAE OF CONCERNED WOMEN FOR AMERICA AND FREE CONGRESS FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICI IN THIS CASE[1]

Amicus curiae, Concerned Women for America ("CWA"), is a national non-profit organization representing approximately 600,000 people. CWA's purpose is as

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[1]Counsel of record to the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

follows:

> The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities which represent the concerns of men and women who believe in these values.

Amicus curiae, the Free Congress Research & Education Foundation, is a non-partisan, non-profit public policy research institute formed in 1977. It is dedicated to advancing traditional values through, among other activities, (i) education and research on issues of legal and social policy, state policy (including the initiative and referendum process), fiscal responsibility, and institutional reform, and (ii) training in conservative governance and coalition leadership, both in the United States and throughout Eastern Europe and the new independent states.

Amici strongly support free speech and religious liberty, and strongly oppose restrictions on speech upon public property that has been opened to the public for expressive activity.

SUMMARY OF ARGUMENT

The Second Circuit has forced a newly-created fourth category into public forum analysis by treating the school district's facilities as simultaneously a designated public forum *and* a nonpublic forum. The facilities cannot be both.

The school district's facilities are a designated public forum, as the Second Circuit held. The exclusion of only religious speech is therefore the same content discrimination this Court condemned in *Widmar*. It is also viewpoint discrimination (which is unconstitutional in both designated and nonpublic fora) because Lamb's Chapel does not seek access to speak about the subject of religion, but to speak about

other subjects (such as the family) from a religious viewpoint.

The school district's facilities are not a nonpublic forum, but even if they are the content-based exclusionary policy is unconstitutional. The Second Circuit erroneously assumed that the government has unlimited authority to exclude any subject or speaker from a nonpublic forum for any reason or for no reason, misconstruing this Court's nonpublic forum cases. Content-based exclusions from nonpublic fora must be justified by the purposes of the forum, under *Grayned*. Here, no such justification is offered and none is possible.

The Second Circuit cannot have applied this Court's forum analysis correctly. First, the Second Circuit's reasoning is circular, making the designated forum a nonpublic forum only as to religious speech simply because the school district says so and allowing the school district to opt out of strict scrutiny review at will. Second, the Second Circuit's result irreconcilably conflicts with *Widmar*. If the Second Circuit did apply forum analysis correctly, that analysis has departed from the correct constitutional principles set out in *Grayned* and should be modified to avoid circularity and to avoid conflict with *Widmar*, as a host of commentators have urged.

Additionally, the exclusion of only religious speech violates the First Amendment independent of the forum and content discrimination rules. It is invidious discrimination because it is just as content-based as an exclusion of all blacks' speech would be. It is a prior restraint because it is arbitrary--there is no articulable reason for it--and because it is the same discretionary and standardless restraint condemned in *Cantwell*. It violates both the Establishment and the Free Exercise clauses by its hostility to religion. Finally, it is overbroad because it necessarily censors *non*religious speech as well.

ARGUMENT

I. THE SCHOOL DISTRICT'S EXCLUSION OF ONLY RELIGIOUS SPEECH IS UNCONSTITUTIONAL UNDER PUBLIC FORUM ANALYSIS.

A. Discriminatory Content-Based Exclusions Are Unconstitutional in a Designated Public Forum Such as the School District Facilities Here.

1. The School District's Facilities Are a Designated Public Forum, as the Second Circuit Found.

The Second Circuit correctly held that the school district by policy and practice had opened its facilities to the public for expressive activity, so that the facilities had become a designated or limited public forum. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381, 386, 388 (2d Cir. 1992). However, the Second Circuit went on to relegate the facilities to a previously unknown "subcategory" of designated public forum "that allows it to remain *non-public* except as to specified uses." *Id.* at 386.[2] Because the school categories of speech. *Id.* at 388. As a result of this judicial creativity, the Second Circuit paradoxically permitted the school district to engage in content discrimination that is unconstitutional in designated public fora and to engage in viewpoint discrimination that is unconstitutional even in nonpublic fora. If permitted, this approach would allow any content discrimination, anywhere, any time: merely by governmental definition, the front of the constitutional bus becomes a designated forum for nonreligious speech, and the back of the bus is where religious speech must go.

2. Content and Viewpoint Discrimination Against Religious Speech Are Unconstitutional in a Designated Public Forum, as This Court Held in Widmar.

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[2]Throughout this Brief, all emphasis is added and all internal citations are omitted unless otherwise noted.

By definition, the school district's exclusion of all speech "for religious purposes," 959 F.2d at 387, is discrimination based on the content of speech. Content- and viewpoint-based restrictions are "incompatible with the central precepts of the first amendment" because, first, they "mutilate 'the thinking process of the community.'" Stone, *Content Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 55 & n.37 (1987) (quoting A. Meiklejohn, *Political Freedom* 27 (1960)). Second, such restrictions carry a high risk of improper motivation, "for government officials will often, consciously or unconsciously, be influenced by their own opinions about the merits of the restricted speech." Stone, 54 U. Chi. L. Rev. at 56. The risk of improper motivation is not limited to society-wide prohibitions of a message or a category of speech, but also exists for "situational restraints," such as the specific exclusion in this case. Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 Va. L. Rev. 1219, 1225 (1984).

Thus, in *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981), this Court applied strict scrutiny and struck down a public university's selective exclusion of only religious speech from its designated forum. There was no hint of the verbal legerdemain used by the Second Circuit--i.e., that the university could save its discrimination by positing a nonpublic forum for religious speech and a designated public forum for other speech.

This case is no different from *Widmar*. While the Second Circuit attempted to distinguish *Widmar*, the only argument it could find was that *Widmar* involved students seeking access to a forum open only to students, while this case involves "outside organizations seeking access." 959 F.2d at 389. The distinction is nonexistent because the forum at issue here has not been limited to students, but has by policy and practice been opened to "outside organizations." Lamb's Chapel is no more of an outside organization than are the humane societies, property owners' associations, dance groups, choral societies, political commit-

tees, Brownies, and the dozens of other social, civic, and recreational groups given access to the school district's facilities. None of those groups is a student group, and there is no argument in this case that the school district's facilities have been opened only to student groups. Lamb's Chapel is within the same class as the multitude of other groups that have been granted access, but has been excluded solely because of the religious content of its speech. This case is therefore governed by *Widmar* and the school district's policy cannot stand.[3]

Widmar merely applied, in the context of a designated forum, a bedrock principle of the First Amendment: selective exclusion from a public place on the basis of speech content is unconstitutional.

> [U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it *may not select which issues* are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. *Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.*

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[3] Widmar's holding that religious speech may not be excluded from a designated forum absent a compelling state interest is not contradicted by some arguably unbounded dicta in Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("a public forum may be created by government designation . . . for use by the public at large . . . , for use by certain speakers, or for the discussion of certain subjects"). Widmar dealt squarely with the identical issue presented here--denial of access to a public school's designated forum based solely on the religious content of the applicant's speech, where the applicant is of the same class of speakers as those to whom the forum has been opened. Cornelius did not address religious speech at all. Just as important, the exclusion upheld in Cornelius was premised on the applicants' demonstrated disruptiveness. 473 U.S. at 810-11.

Police Dept. v. Mosley, 408 U.S. 92, 94 (1971) (invalidating city ordinance prohibiting all picketing next to a school except labor picketing).

3. Censorship of Religious Speech Is Also Viewpoint Discrimination.

The Second Circuit failed to realize that the school district's blanket exclusion of all religious speech also constitutes viewpoint discrimination, which is unconstitutional whether the school district's facilities are a designated forum or a nonpublic forum. The government engages in viewpoint discrimination when it "grant[s] to 'one side of a debatable public question . . . a monopoly in expressing its views.'" *United States v. Kokinda*, --- U.S. ---, 110 S. Ct. 3115, 3125 (1990), quoting *Monterey County Democratic Central Committee v. United States Postal Service,* 812 F.2d 1194, 1198-99 (9th Cir. 1987). Here, the school district grants a viewpoint monopoly by allowing speech by anyone who finds religion unilluminating on the issue discussed, and at the same time barring speech by anyone who finds religion illuminating on the issue and wishes to say so. The exclusion is not of speech about the *subject* of religion, but of speech expressing religious *viewpoints* about other subjects (in this case, the American family).[4] Nearly all reli-

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[4] Exclusion of all speech about a particular subject may have a viewpoint-differential impact and

gious speech is also some other type of speech, which is also then censored by the school district. The purportedly content-neutral exclusion of all religious speech is not viewpoint-neutral, but is a masquerade for viewpoint discrimination. *See May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986) ("allow[ing] the premises to be used for any meetings by teachers except prayer meetings . . . would be a restriction discriminating against a particular point of view").

It is not viewpoint neutral to say that all religious speech equally must go to the back of the expressive bus.

B. Discriminatory Content-Based Exclusions Are Unconstitutional Even in a Nonpublic Forum When Not Tied Directly to the Purposes of the Forum.

1. The Court Generally Has Upheld Only Content-Neutral Exclusions from Nonpublic Fora.

Where this Court has upheld restrictions on speech in nonpublic fora, most often the restrictions were content-neutral. In *International Society for Krishna Consciousness, Inc. v. Lee*, --- U.S. ---, 112 S. Ct. 2701 (1992), and in *Kokinda*, --- U.S. ---, 110 S. Ct. 3115, the restrictions in question forbade *all* solicitation based on "the inherent nature of solicitation itself, a content-neutral ground," and "[did] not discriminate on the basis of content or viewpoint."

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should be strictly scrutinized, as Dean Stone has pointed out. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81, 109-11 (1978). There is a clear viewpoint-differential impact here: exclusion of all speech about the subject of religion furthers non-religious viewpoints, which prefer that religion not be discussed at all, and treats religious viewpoints as second-class in comparison to other viewpoints. The harm is not ameliorated by treating all religious viewpoints as equally second-class.

Kokinda, --- U.S. ---, 110 S. Ct. at 3124-25 (plurality opinion). *See also id.*, --- U.S. ---, 110 S. Ct. at 3126 (Kennedy, J. concurring in the judgment) (ban on all solicitation "does not discriminate on the basis of content or viewpoint"). In *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981), the restriction banned *all* unstamped mailable matter from letterboxes. The Court upheld the restriction because it was a "content-neutral regulation." *Id.* at 131 n.7. In *Adderley v. Florida*, 385 U.S. 39, 48 (1966), the Court upheld application of a state trespass statute against protestors who blocked a jail driveway and adjacent property because the trespass statute had a "lawful nondiscriminatory purpose."[5]

Other exclusions that have been upheld were based on the identity of the speaker but were content-neutral and were based on incompatibility with the purposes of the forum. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 46, 49 (1983) (distinction between speakers upheld "based on the *status* of the respective unions," not on the content of their speech); *id.* at 55 (reiterating "difference in status"); *Widmar*, 454 U.S. at 268 n.5 (university forum open to student groups not necessarily open to non-students). Such speaker identity distinctions are permissible only "in the process of limiting a nonpublic forum to activities *compatible* with the intended purpose of the property." *Perry*, 460 U.S. at 49. *Accord* Comment, *Forum Over Substance: Cornelius v. NAACP Legal Defense & Education Fund*, 35 Cath. U.L. Rev. 307, 310 & n.27 (1985); Buchanan, *The Case of the Vanishing Public Forum*, 4 U. Ill. L. Rev. 949, 962 n.122, 973-74 (1991) (restrictions based only on speaker identity are content-neutral and are properly tested against a reasonableness standard). Valid speak-

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[5] *Accord* May, 787 F.2d at 1113 (exclusion of all teacher groups upheld, but exclusion only of religious teacher groups would be "an abridgment of free speech however one classifies the [school] along the range of public-private forum").

er identity distinctions are content-neutral; they cannot exclude all religious speakers.

Subject matter exclusions, on the other hand, because they are by definition content-based, should trigger strict scrutiny (or at least intermediate scrutiny). *See Consolidated Edison v. Public Service Comm'n*, 447 U.S. 530, 537, 538 (1980) ("First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire *topic*"; "[to] allow a government the choice of permissible *subjects* for public debate would be to allow that government control over the search for political truth"). Thus, the Court has struck down content-based restrictions on speech in nonpublic fora. *City of Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 (1976) (board of education could not "be required to discriminate between speakers on the basis of . . . the content of their speech").

2. Content-Based Exclusions (Including Subject Matter Exclusions) Are Upheld Only Where They Are Necessitated by the Purpose of the Forum and Are Ideologically or Viewpoint Neutral.

a. The Three Content-Based Exclusions that the Court Has Upheld Were Viewpoint Neutral and Were Necessitated by the Purposes of the Forum in Question.

In three cases to date, this Court has upheld content-based exclusions from nonpublic fora. The special circumstances justifying those exclusions do not exist in this case, even assuming that the school district's facilities can be treated as a nonpublic forum.

First, in *Cornelius*, the Court upheld the federal government's exclusion of legal defense and advocacy groups from the Combined Federal Campaign charitable fund-raiser because those groups' participation in the CFC "jeopardized the success of the Campaign." 473 U.S. at 810. The validity of the exclusion did not

hinge on the government's carte blanche authority to exclude speakers from the nonpublic forum for any reason or for no reason at all. Instead, the government was required to show that the excluded speaker "would *disrupt* [the] forum and *hinder its effectiveness for its intended purpose*." *Id.* at 811. *See also International Society for Krishna Consciousness, Inc. v. Lee*, --- U.S. ---, 112 S. Ct. at 2714 (O'Connor, J., concurring) (*Cornelius* was premised in part on record evidence that participation of excluded groups "would have jeopardized the success of the campaign"; absence of similar evidence from airport authorities made ban on leafletting in airport unreasonable).[6]

Here, the school district has made no attempt to show that Lamb's Chapel's proposed film series on the family would in any way disrupt the forum, jeopardize its success, or hinder its effectiveness. Instead, the school district takes *Cornelius* to the extreme and applies it where there is no disruption and where the proposed religious speech is functionally indistinguishable from permitted speech.

Second, in *Greer v. Spock*, 424 U.S. 828 (1976), the Court upheld a military base's regulation prohibiting all partisan political speeches. The Court premised its decision on the unique characteristics of military bases. *Id.* at 838. Because of the "special constitutional function of the military in our national life," *id.* at 837, the base commander was authorized to determine which civilian speakers "would be

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[6]If the result in Cornelius was not premised on disruption and incompatibility with the forum's purposes, the case is inconsistent with previous cases that focused on compatibility and that allowed content-based distinctions only when the nature of the forum dictated that they be allowed. *See* Comment, 35 Cath. U.L. Rev. at 331 & n.189 (criticizing Cornelius as inconsistent with Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), Widmar, 454 U.S. at 263, and Mosley, 408 U.S. at 92).

supportive of the military mission" of the base and which would not. *Id.* at 838 n.10.[7] The relaxed scrutiny applied in the special case of a military base in *Greer* has no application to the forum of the school district facilities in this case.

Finally, in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court upheld a city's exclusion of political advertisements from spaces in city buses that were used only for commercial advertisements. As this Court recently stressed in describing *Lehman*, the city was "acting as a proprietor, managing its internal operations, rather than acting as lawmaker with power to regulate or license." *International Society for Krishna Consciousness, Inc. v. Lee*, --- U.S. ---, 112 S. Ct. at 2705. The Court's opinion in *Lehman* repeatedly stressed the solely *commercial* purpose of the car card spaces. 418 U.S. at 303-304 ("the city is engaged in commerce"; "[t]he car card space . . . is a part of the commercial venture"; "[r]evenue . . . could be jeopardized" by accepting political advertisements; the city was acting "in a proprietary capacity"). *See* Cass, *First Amendment Access to Government Facilities*, 65 Va. L. Rev. 1287, 1347 (1979) (*Lehman* was correctly decided because of the validity of "[t]he distinction between commercial and other uses"). In addition, a majority of the Court in *Lehman* was concerned that riders of city buses were a "captive audience" that the city could reasonably choose to shield from political advertising. 418 U.S. at 304 (plurality opinion); *id.* at 308 (Douglas, J., concurring).

None of the justifications for the restriction in *Lehman* is present here. Neither the public schools as schools nor the designated forum that the district

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[7] In an interesting contrast to the attitude of the school district officials in this case, one of the civilian speeches that the base commander in Greer had deemed to be "supportive of the military mission" was "a religious service by a visiting preacher at the base chapel." 424 U.S. at 838 n.10.

makes available after school hours are commercial enterprises, as the buses and the car cards were for the city in *Lehman*. Nor is the audience for any of the functions that occur in the school district's designated forum in any sense a captive audience; those who attend functions at the school district's facilities do so voluntarily and because they choose to hear the speech that occurs there.

b. The Touchstone of Public Forum Analysis Has Always Been Whether the Manner of Expression Is Basically Incompatible with the Normal Activity of a Particular Place at a Particular Time.

Long before the Court definitively enunciated the categorization of fora as public, designated, and nonpublic, it had analyzed cases involving speech on public property using the principle that still underlies public forum analysis: compatibility of the speech with the normal use of the forum.

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. *The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.*
>
> . . . .
>
> . . . [I]n each case, expressive activity may be prohibited if it "materially disrupts [the forum] or involves substantial disorder or invasion of the rights of others."

Grayned v. City of Rockford, 408 U.S. 104, 118 (1972). The Court made the same point in *Mosley*, 408 U.S. at 100, which was decided the same day as *Grayned*. In *Mosley*, the Court invalidated a

city ordinance distinguishing between labor and non-labor picketing because one was no more disruptive than the other.

Grayned's emphasis on compatibility of the proposed speech with the purposes of the forum still underlies public forum analysis. *See International Society for Krishna Consciousness, Inc. v. Lee*, --- U.S. ---, 112 S. Ct. at 2708 (emphasizing "the disruptive effect that solicitation may have on business"); *id.* at 2718 (Kennedy, J., concurring in the judgment) ("If the objective, physical characteristics of the property at issue and the actual public access and uses which have been permitted by the government indicate that expressive activity would be *appropriate and compatible* with those uses, the property is a public forum."); *id.* at 2724 (Souter, J., concurring) ("we should classify as a public forum any piece of public property that is 'suitable for discourse' in its physical character, where expressive activity is *'compatible'* with the use to which it has actually been put"), citing *Grayned*, 408 U.S. at 116. *See also Widmar*, 454 U.S. at 277 (recognizing "a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education"); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) ("nondisruptive speech . . . is still protected speech even in a nonpublic forum").

3. The School District's Exclusion of All Religious Speech Is Not Necessitated by the Purposes of This Forum Nor by Any Incompatibility with Its Normal Activities.

The school district is unable to offer any forum-related justification for its discriminatory exclusion of all religious speech. Absent some justification, however, the exclusion cannot stand even if the school district's facilities are a nonpublic forum. As Justice O'Connor noted in discussing previous nonpublic forum cases:

> [W]e have required some explanation as to why certain speech is inconsistent with the intended use of the forum.

International Society for Krishna Consciousness, Inc. v. Lee, --- U.S. —, 112 S. Ct. at 2714 (concurring opinion). Otherwise, the forum easily becomes a disguise for viewpoint discrimination. *See* Farber & Nowak, 70 Va. L. Rev. at 1240-41 ("[T]he government's goals in passing the challenged situational restraint . . . must relate to the specific situation and to the kind of speech being regulated. If the governmental regulation bans a certain type of speech in schools, the government goals should relate to schools and to the effects of the regulated speech in the school environment, and not to the general undesirability of certain kinds of speech."); Stone, 46 U. Chi. L. Rev. at 114 ("[T]he state must explain not only why it restricted the speech it restricted, but also why it failed to restrict the speech it exempted from the restriction. It must, in other words, justify the content-based restriction. Such justification is necessary . . . because the very existence of the content-based distinction tends to undercut the state's showing . . . that the restriction is designed to serve some substantial government purpose."). *Accord* Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1827 (1987) (selective access to a forum is permissible only for "the achievement of legitimate institutional ends").

The school district might attempt to offer Establishment Clause concerns as a justification for the exclusion of all religious speech, but those concerns have already been disposed of by this Court. *See Board of Educ. v. Mergens*, --- U.S. ---, 110 S. Ct. 2356, 2373 (1990) (Equal Access Act for student-initiated religious groups in public high schools does not violate Establishment Clause); *Widmar*, 454 U.S. at 270-75 (offering public university facilities to religious groups on the terms available to other groups does not violate Establishment Clause).

The school district might also attempt to offer con-

troversy-avoidance concerns as a justification, but those concerns too have been disposed of repeatedly by this Court:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Tinker, 393 U.S. at 514. *See also id.* at 508 ("in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"); *Mosley*, 408 U.S. at 100-101 (citing and quoting *Tinker*).

4. The Exclusion of All Religious Speech, While Permitting All Other Categories of Speech, Is Unconstitutional Viewpoint-Based Discrimination, Even if the Second Circuit Were Right that Content-Based Discrimination Is Permissible in Designated Public Fora.

As this Court has repeatedly held, viewpoint exclusions are the prime evil against which the First Amendment protects, even in nonpublic fora. "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (city-owned utility poles a nonpublic forum).

Here, the school district contends that its exclusion is viewpoint neutral because it applies to all religious speech. But the purportedly content-neutral exclusion of all religious speech is in fact viewpoint discrimination. *See supra* Section I.A.3. In this instance, the proposed speech would have been a religious viewpoint on the subject of the American family. In the next instance, the speech may be a religious viewpoint on politics, the arts, crime and punishment, and so on. The school district's policy grants access

to the Manorville Humane Society but denies access to any animal protection society operating with a religious viewpoint on the morality of cruelty to animals. The policy grants access to H.E.L.P. (Help Every Living Person), but denies access to any poverty relief organization with a religious viewpoint on an individual's obligation to help the less fortunate. The school district's policy is nonsensical, but it is also unconstitutional viewpoint discrimination.

C. If Recent Public Forum Analysis Permits the School District's Censorship in This Case, the Court Should Modify that Analysis To Reaffirm the Compatibility Standard.

1. The Second Circuit's Public Forum Analysis Is Circular and Destroys All Distinction Between a Designated Forum and a Nonpublic Forum.

According to the Second Circuit, the school district's facilities are a designated forum only for permitted speech: "the school property in question falls within the subcategory of 'limited public forum,' the classification that allows it to remain non-public except as to specified uses." 959 F.2d at 386. Contrary to this Court's precedent, the Second Circuit failed to require the school district to justify its exclusions based on any particular purpose of the forum. The Second Circuit's approach therefore allows the school district entire freedom to specify discriminatorily the uses (i.e., the subjects and viewpoints) that it will accommodate in its designated forum and to exclude discriminatorily other subjects and viewpoints (by failing to specify them), all without relation to the purpose of or activities in the forum and without any evidence of disruption. Thus, the school district's facilities are a designated forum for the "Hampton Council of Churches/Family Counseling Services Billy Taylor Concert" and the "Southern Harmonizers Gospel Singing," but remain a nonpublic forum for Lamb's Chapel's film series *simply because the school district says so*.

The Second Circuit's approach makes public forum

analysis circular--the school district can restrict speech simply because it intends to:

> [H]ere, because the Court categorizes a place as a particular type of forum by reference to the restrictions on expression the government *intended* for that place, the Court allows the government to set its own standard of review. Thus, a circular pattern emerges. The government decides to restrict expression in a place. The Court, seeing that the government intended to restrict expression there, categorizes the place as a type of forum according to the degree of restriction the government intended. The type of forum then dictates the degree of restriction. When the restriction is challenged, the Court, with an appropriately relaxed examination, accepts the government's justifications, thereby validating the restrictions. Thus, the government is permitted a restriction because the government intended that restriction.

Comment, 35 Cath. U.L. Rev. at 332 (emphasis in original).

The result is that speakers who have been deliberately excluded from a forum will never succeed in obtaining access to the forum:

> If a limited public forum is neither more nor less than what the government intends it to be, then a first amendment right of access to the forum is nothing more than the claim that the government should be required to do what it already intends to do in any event.
>
> [This approach] shrinks the limited public forum to such insignificance that it is difficult to imagine how a plaintiff could ever successfully prosecute a lawsuit to gain access to such a forum. If the reach of the forum is determined by the intent of the government, and if the exclusion of the plaintiff is the best evidence of that intent, then the plaintiff loses in every case.

Post, 34 UCLA L. Rev. at 1756-57.

To derive its approach, the Second Circuit misconstrued *Perry*, as commentators have feared would happen:

> *Perry* distinguishes the various fora on the basis of the government's action in allowing or limiting access to particular property, a distinction which is valuable as a broad outline of forum analysis. This distinction is misleading, however, if used as a method of analysis rather than a summary of that analysis, as it implies that the government may restrict expression in some places simply because it intends to restrict expression in those places. A closer look reveals that . . . the underlying principle remains quite simple: restrictions on expression are constitutionally permissible only to the extent that such restrictions require compatibility with the normal use of the property.

Comment, 35 Cath. U.L. Rev. at 310-11.

A final flaw of the Second Circuit's forum analysis is that the school district can set its own standard of review and can opt out of the compelling interest test (or an intermediate test) at will:

> The most troubling thing . . . is that censorship can become self-justifying . . . . The implication is that the government can convert a limited public forum to a nonpublic forum without any reason whatever, or even because of hostility to speech. The government's intention to close or limit the forum may be shown by evidence that it has excluded speakers in the past. A choice to close the limited public forum is not constrained by a requirement that all speech be treated equally; the government can

> allow some speakers into a nonpublic forum while excluding others. . . .
>
> It makes little sense to apply the compelling interest test to a category of cases and then let the government opt out of the category at will.

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 46-47 (1986). *See also* Comment, 35 Cath. U.L. Rev. at 333 ("Motivation becomes justification, without regard to the constraints imposed by the first amendment.").

2. The Second Circuit's Public Forum Analysis Treats Religious Speech Less Fairly Than Other Categories of Speech, in Direct Conflict With Widmar.

Widmar is virtually identical to this case: a governmental unit purported to open a forum to all speakers within a designated class except religious speakers. The Second Circuit's decision in this case, however, is contrary to this Court's resolution of the issue--this Court did not allow the university in *Widmar* to define the forum as open to "all student groups except religious student groups" and thereby to evade strict scrutiny of its exclusion by simple semantics.

Professor Buchanan anticipated this conflict in a hypothetical example that might as well have been lifted directly from this case:

> The strength of the *Widmar* holding erodes if the government is permitted to frame its original invitation on the basis of the subject matter of speech. For example, suppose the university had extended its original invitation to "all students who want to speak on any subject other than religious matters." If the applicable forum--the university's facilities--retains its nonpublic forum status as to speakers outside the defined class, the Court

> will apply to restrictions affecting such speakers the more lenient standards of review used in nonpublic forum cases. That, in turn, provides the government with a ready means for avoiding the reach of the transformation principle announced in *Widmar*.

Buchanan, 4 U. Ill. L. Rev. at 960-61.[8] *Widmar* and the Second Circuit's resolution of this case cannot be reconciled.

3. The Grayned Standard Avoids the Circularity Problem and Is Consistent with Widmar.

Amici believe that the Second Circuit's resolution of this case was not compelled by this Court's public forum cases, but was instead a misconstruction of those cases. *See supra* Sections I.A.2.-3., I.B.1.-4., and I.C.1.-2.

If, however, the Second Circuit properly applied this Court's most recent public forum analysis, the result reached in this case demonstrates that public forum analysis has become circular and is being used to deny the very protections it was meant to enforce. *See supra* Section I.C.1.

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[8]This case is also identical to Widmar in another respect: the school district in this case relies on a state statute that has been interpreted to limit the use of school facilities to nonreligious purposes, while the university in Widmar relied on an interpretation of the Missouri constitution forbidding access to the university's facilities by religious student groups. This Court held in Widmar that the federal constitutional right of access under the Free Exercise Clause and the Free Speech Clause overrode any contrary state law. 454 U.S. at 276. *See also* Laycock, 81 Nw. U.L. Rev. at 50 n.234 ("Widmar found a federal right of access to a university open forum that overrode contrary state law."). The same result necessarily follows here.

The solution would be to return to the incompatibility standard enunciated in *Grayned* and other earlier cases that served as the theoretical basis for public forum analysis: if the manner and subject of the speech is basically compatible with the normal activity of the public place at the time of the speech, any restriction of the speech should be strictly scrutinized. That standard prevents disruption of public fora while at the same time preventing unnecessary and unjustified discrimination against certain subjects or viewpoints, all without falling into definitional circularity.

> The attraction of *Grayned* is not difficult to appreciate. Its logic begins from the constitutionally congenial premise that the state should not suppress speech unless there is a good reason to do so. The reason for discouraging speech on government property is that it may interfere with the use of that property. If such interference occurs, the state may justifiably prohibit speech; conversely, the absence of interference indicates that the state may lack sufficient grounds to abridge speech. The doctrine proposed by *Grayned* thus invites courts to focus precisely on the relationship between speech and the reasons for its regulation, and it is designed to maximize the speech which the government is constitutionally required to tolerate, consistent with the appropriate and needful use of its property. This design flows naturally from the first amendment's central objective of ensuring "uninhibited, robust, and wide-open" public debate.

Post, 34 UCLA L. Rev. at 1766.

That is why, as Professor Post has observed, "[b]y far the great majority of commentators have advocated that some variant of the *Grayned* approach be adopted." *Id.* at 1765, citing M. Nimmer, *Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment* § 4.09[D], at 4-73-4-74 (2d ed. 1984); L. Tribe, *American Constitutional Law* 690-92 (1978); Cass, 65 Va. L. Rev. at 1317-18; Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 Ohio St. L.J. 247, 261-62 (1962); Stone, *Content-Neutral Restrictions*, 53 U. Chi. L. Rev. 46, 93-94 (1987); Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 Cardozo L. Rev. 335, 378-84, 423-24 (1986); Note, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 Stan. L. Rev. 117, 138 (1975); Note, *A Unitary Approach to Claims of First Amendment Access to Publicly Owned Property*, 35 Stan. L. Rev. 121, 143-51 (1982). *See also* Comment, 35 Cath. U.L. Rev. at 311, 331; Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 Geo. Wash. L. Rev. 109, 112 (1986).

II. THE SCHOOL DISTRICT'S EXCLUSION OF ONLY RELIGIOUS SPEECH IS UNCONSTITUTIONAL UNDER OTHER FREEDOM OF EXPRESSION PRINCIPLES.

A. The Exclusion Is Invidious Discrimination.

Exclusion of religious speech is no different (and no more related to the purposes of this forum) than exclusion of blacks' speech, or exclusion of women's speech, or exclusion of a nationality's speech: it is the most invidious of discriminations. In each case, the exclusion conveys the governmental message that the permitted speech is first class, and that the excluded speech is second class or worse. Such an exclusion orders religious speech off the constitutional bus.

This sort of exclusion strikes at the heart of the First Amendment:

> But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, it subject matter, or its content. *Cohen v. California*, 403 U.S. 15, 24 (1971); *Street v. New*

> *York*, 394 U.S. 576 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964). . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan*, *supra*, at 270.

Mosley, 408 U.S. at 95. An exclusion of religious speech rests overtly on its content, and on nothing else.

B. The Exclusion of Only Religious Speech Is Arbitrary and the School District Exercises Standardless Discretion in Enforcing the Exclusion, Which Constitutes a Prior Restraint.

1. Exclusion of Religious Speech Is Arbitrary.

Almost all religious speech is intermixed with political, philosophical, ideological, or other protected speech. The search for "pure" religious speech would not find many sermons and prayers, and would find little else. Instead, most religious speech involves religious perspectives on issues that others address from political, philosophical, or other ideological perspectives. A perfect example is the Focus on the Family Film series that Lamb's Chapel sought to exhibit in the school district's facilities, which involve not only Biblical principles about the family but secular psychology and other opinion.

Singling out religious speech for exclusion is arbitrary discrimination and is contrary to the oft-repeated test that there must be "neutrality between religion and religion, *and between religion and nonreligion*." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). *E.g., Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

It is also arbitrary to allow speech on a topic when it is from other perspectives, but to exclude it when it is from religious perspectives. There is no constitutionally permissible rationale for permitting some but not other perspectives on the same issue. Even in the most nonpublic of forums (a military base), an exclusion cannot "be applied irrationally, invidiously, or arbitrarily." *Greer*, 424 U.S. at 840. In other locations, many cases have found that exclusion of religious speech was arbitrary. *E.g., Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) ("completely arbitrary and discriminatory"); *Hague v. CIO*, 307 U.S. 496, 516 (1939) ("arbitrary suppression of free expression").

2. Exclusion of Religious Speech Is Discretionary and Standardless.

If religious speech is normally intermixed with other protected speech, any enforcement of a prohibition on religious speech must inherently involve standardless official discretion in determining what part of the mixed speech is religious and what speakers may be excluded as intolerably religious. What standard guided the official censor in determining that the Focus on the Family films must be excluded as "religious"? They were not excluded for being *wholly* religious, because the films contain much secular psychology. They must then have been excluded for being *too* religious. But what standards determined what percentage was too religious, what portions were religious perspectives in the overlap with psychology and counseling disciplines, and at what point entire films instead of only religious segments were excluded? The exclusion of the film required standardless determinations on each of those issues.

Such standardless discretion in identifying religion and excluding it violates the First Amendment as a prior restraint and censorship, as this Court recognized in *Cantwell v. Connecticut*:

> [The official] is empowered to determine whether

> the cause is a religious one . . . . His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a *censorship* of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and . . . the Fourteenth.

310 U.S. 296, 305-06 (1940). Such official discretion has been repeatedly condemned by this Court. *E.g., Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976); *Niemotko*, 340 U.S. at 271; *Kunz v. New York*, 340 U.S. 290, 294 (1951). Also, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times v. United States*, 403 U.S. 713, 714 (1971).

C. The Exclusion Shows Hostility Toward Religion, Which Is Prohibited by the Religion Clauses of the First Amendment.

1. The Establishment Clause Prohibits Hostility Toward Religion.

The Court has long recognized that hostility toward religion would violate the Establishment Clause, because that clause forbids not only "advancement [but] inhibition of religion." *Walz v. Tax Commission*, 397 U.S. 664, 672 (1970). The Court has cautioned that "affirmatively opposing or showing hostility to [theistic] religion" would impermissibly prefer nontheists over theists. *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963). Justice Goldberg's concurrence noted that "pervasive devotion to the secular" and "hostility to the religious" would contravene the Establishment Clause. *Id.* at 306. In *Everson*, the Court noted that government must not be the "adversary" of religion or "handicap" religions.

Everson v. Board of Education, 330 U.S. 1, 18 (1947). "[G]overnmental hostility to religion or religious teaching" would "be at war with . . . the free exercise of religion." *McCollum v. Board of Education*, 333 U.S. 203, 211-12 (1948). Justice Brennan's concurrence when the Court struck down the exclusion of ministers from legislatures noted that "the exclusion manifests patent hostility toward . . . religion . . . and, in sum, has a primary effect which inhibits religion" in violation of the Establishment Clause. *McDaniel v. Paty*, 435 U.S. 618, 636 (1978).

Here, permitting other speech while excluding religious speech was simply "preferring those who believe in no religion over those who do believe," contrary to the Establishment Clause. *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

2. The Free Exercise Clause Prohibits Hostility Toward Religion.

As Professor Archibald Cox has noted, "[t]he framers put freedom of conscience first, and then moved on to freedom of speech and the press. They were concerned above all else with spiritual liberty: freedom to think, to believe, and to worship." A. Cox, *Freedom of Expression* 1 (1982). This Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and other decisions has shown deep respect for religious rights. The Court has routinely struck down discrimination against religion, whether in excluding religious groups from public universities, *Widmar*, 454 U.S. at 269-70, in excluding ministers from state legislatures, *McDaniel*, 435 U.S. 618, or in excluding seminary students from university grants to the blind, *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). Such "hostility would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of free exercise of religion.' *McCollum, supra*, at 211-212." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

The decision in *Employment Division v. Smith*

condemns this sort of discrimination against free exercise of religion, when it forbids laws directly prohibiting free exercise of religion. --- U.S. ---, 110 S. Ct. 1595 (1990). The school district's rule that bars religious speech is precisely a rule prohibiting free exercise.

D. The Exclusion Denies Due Process and Equal Protection Because It Is Unconstitutionally Overbroad.

The exclusion of all religious speech censors not just the religious portions but the nonreligious portions of speech. For example, the exclusion of the Focus on the Family film applied not only to its Biblical discussion but also to its secular psychology. This overt exclusion of nonreligious speech mixed with religious speech is the first aspect of overbreadth. The exclusion of religion also chills speech by speakers with religious viewpoints. Those speakers, instructed that they may not engage in (undefined) religious speech, inevitably will censor themselves and avoid even speech that is permitted from fear of violating the prohibition. This practical exclusion of nonreligious speech is the second aspect of overbreadth.

This Court has consistently decried such overbreadth. It struck down the prohibition of all "First Amendment activities" in the Los Angeles airport:

> We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.

Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. at 575. *E.g., Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). No conceivable governmental interest justifies "such an absolute prohibition of [religious] speech" here, particularly when the forum is a designated public forum. The uneventful use of the public school facility for nonreligious speech shows the lack of any governmental interest in prohibiting any nondisruptive speech, and the overbreadth of

prohibiting religious speech.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to reverse the judgment of the United States Court of Appeals for the Second Circuit in this case.

Date: November 19, 1992.

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No. 91-2024

In the
Supreme Court of the United States
October Term, 1992

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of the Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, THE NATIONAL SCHOOL BOARDS ASSOCIATION, THE ANTI-DEFAMATION LEAGUE, AND THE COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

This brief is filed on consent of all parties. Letters of consent are on file with the Clerk of this Court.

The New York State School Boards Association (NYSSBA), the National School

Boards Association (NSBA), the Anti-Defamation League (ADL), and the Committee for Public Education and Religious Liberty (PEARL) submit this amici curiae brief in support of respondents, Center Moriches Union Free School District and Louise Tramontano in her official capacity as President of the Board of Education for Center Moriches Schools (hereinafter also referred to as "respondents" or the "school district").

NYSSBA is a not-for-profit corporate instrumentality of the public school districts of the State of New York, and represents approximately seven hundred forty (740) or ninety-four percent (94%) of such public school districts who are members of this Association. Pursuant to section 1618 of the Education Law of the State of New York, NYSSBA has the

responsibility of devising practical ways and means of attaining greater economy and efficiency in the administration of public school district affairs and projects.

NSBA is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 40, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children. The subject of this case concerns every school district in the country. Most school districts have policies which allow use of school buildings by outside

organizations but very few, if any, allow their schools to be used as open public fora.

Since 1913, the ADL has pursued the objective set out in its Charter "to secure justice and fair treatment of all citizens alike." In order to further this objective, ADL has fought steadfastly to remove barriers which have prevented individuals from fully enjoying the rights protected by federal civil rights laws and the Constitution, including the right to privacy, free speech, freedom of religion and equal protection.

In order to protect fully the freedoms of a thriving and pluralistic democracy, ADL is committed to supporting the vitality of our public education system. ADL believes that school

authorities must operate within the parameters of the First Amendment's guarantees of free speech and separation of church and state. The First Amendment is particularly vital in the school setting, where children learn the lessons of citizenship and where respect and tolerance for others must be taught. The authority of school officials to create a limited open forum and maintain control over access to school facilities is an important component of this educational process.

PEARL is a coalition of civic, educational, religious, labor, and civil rights organizations and individual members committed to the preservation of the dual principle of the separation of church and state and the free exercise of

religion, as they relate to affect education in the State of New York.

Pursuant to U.S. Supreme Court Rule 37.3, Amici set forth that they submit this brief in support of the respondents in the present action and urge this Court to affirm the decision of the Second Circuit Court of Appeals.

School districts in this nation, and especially in New York State seek guidance from this Court as to whether state statutes and the application of such statutes which limit the purposes for which public school facilities may be used are constitutional. Amici fear that if this Court reverses the decision below, public school districts will loose their ability to operate as limited open fora because school authorities will be left with only two choices, that is,

either to allow their facilities to be utilized for no outside purposes or for all.

This would be so because under the reasoning advanced by the petitioners, if a school district allows its facilities to be used for any one nonschool related purpose, it would have to permit their use for all other purposes, as well. Once opened, the use of school facilities would have to be made available to even groups which, for example, preach racial intolerance in contravention of the educational mission of our public school system to teach pluralism and mutual respect for all people. (See, Bethel School District No. 403 v. Fraser, 106 S.Ct 3159 (1986); Hazelwood School District v. Kuhlmeier, 108 S.Ct 562 (1988)).

Also, since public school facilities are not traditional public fora, petitioners cannot claim their exclusion rises to the level of a constitutional infringement. Petitioners are free to exercise their constitutional rights in other facilities which are traditional public fora.

Additionally, if petitioners' line of reasoning is accepted by this Court, public school facilities would become available for religious proselytization and other purposes which contravene the educational mission of the public school system.

STATEMENT OF THE CASE

Amici incorporate by reference thereto the statement of the case contained in the brief of the respondents.

ARGUMENT

I. Introduction

The Tenth Amendment to the United States Constitution reserves the authority over education to the states. In New York, Article XI §1 of the State Constitution declares that the State legislature shall provide for a system of free public education for all children in the State. In fulfilling its constitutional obligation, the New York Legislature has provided for the establishment of local boards of education, and enumerated the powers and duties attributable to these boards. (See, Basset v. Fish 75 NY 303 (1878)).

Section 414 of the New York State Education Law prescribes the scope of authority public school boards throughout the State may exercise over the custody,

control and supervision of all school district property entrusted to them. This authority includes the discretion to allow public access to school district property under specified conditions and for the purposes specifically enumerated by the statute at issue. (Travis v. Owego-Appalachin School Dist., 927 F.2d 688 (2d Cir. 1991); Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676 (2d Cir. 1988); Trietley v. Board of Educ. of the City of Buffalo, 65 AD2d 1 (1978); see Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), cert. denied 454 U.S. 1123 (1981)). New York public school district facilities are traditionally nonpublic fora. They loose this status and become designated public fora only upon the determination by a school board to open the district's

facilities for one or more of the enumerated purposes in §414. There is no mandate in §414 that a school district permit access for all of the enumerated purposes if it determines it would be appropriate to permit access for only one or two of such purposes. Neither does §414 authorize school districts to provide access to public school property beyond the purposes enumerated therein.

Petitioners argue that the respondent school district has established a designated public forum and that once it has opened its facilities for use by a particular class of individuals it may not preclude others from that class from utilizing the premises regardless of the purpose for which they seek access. They challenge, as view-point discrimination, the

exclusion of religious groups from public school facilities, when those groups seek access to said facilities as a podium for communicating a religious message. Petitioners, thus, ask this Court to reverse the decision of the United States Court of Appeals for the Second Circuit which held to the contrary. Amici respectfully submit the decision below was proper. New York State Education Law §414 properly limits the purposes for which public school facilities may be used when school districts in the state elect to designate as limited open fora the property entrusted to them.

II. Private access to public school facilities under a limited open forum analysis is not determined exclusively by an inquiry into the eligibility of the speaker.

Petitioners challenge the decision of the Second Circuit as contrary to

traditional forum analysis. They contend exclusion from access to public school facilities designated as limited open fora must be based on the nature of the speaker, and not on the nature of the activity involved. However, this Court has held that:

> 'Nowhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for...unlimited expressive purposes.'...The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue. Perry Education Assn. v. Perry Local Educators' Assn., 103 S.Ct 948, supra (1983) (citations omitted).

That special considerations apply in the context of public school facilities has been further recognized by this Court in the case of County of Allegheny v. American Civil Liberties Union, Greater

Pittsburgh Chapter, 492 U.S. 573 (1989), where in condemning the display of a Christian nativity creche on the grand staircase of the county courthouse as an unconstitutional act of government endorsement of religion, and recognizing the result might have been different if along with the creche, there had been on display other symbols which might "neutralize" the religious effect of the creche, this Court nonetheless felt compelled to observe:

> This is not to say that the combined display of a Christmas tree and a menorah is constitutional wherever it may be located on government property. **For example, when located in a public school, such a display might raise additional constitutional considerations. Cf. Edwards v. Aguillard, 482 US, at 583-584 (Establishment Clause must be applied with special sensitivity in the public-school context).** 492 U.S. at 620 (emphasis added).

That forum analysis requires in certain instances more than an inquiry into the nature of the forum and the speaker is further illustrated by the decision of the United States Court of Appeals for the Eleventh Circuit in Chabad-Lubavitch of Georgia v. Miller, 61 USLW 2328 (Dec. 1, 1992), (cf., Americans United for Separation of Church and State v. Grand Rapids, Mi., 61 USLW 2327 (Dec. 1, 1992)). The case has added significance in that it involved private access to a traditional open public forum.

In Chabad, the Eleventh Circuit ruled that private placement of a 15-foot menorah in the Georgia state capitol rotunda amounted to an impermissible governmental endorsement of religion, even though the rotunda was also a public

forum. The court determined the public nature of the forum was only one factor to be considered under Establishment Clause analysis. According to that court, the physical context of the display is the most important factor under Allegheny, supra, and controlled the case before it.

The Eleventh Circuit determined that despite Georgia's policy of allowing a wide range of speech in the capitol rotunda, "many of the persons who enter the capitol building and view the menorah would be unaware of that previous activity," and they "in all likelihood would conclude that the menorah occupies the center of the capitol with the support and approval of the state."

Accordingly, Amici respectfully submit that petitioners' argument that

respondent school district may not consider the purpose for which petitioners or other private groups seek access to public school facilities is without merit.

Furthermore, petitioners' reliance upon Grace Bible Fellowship v. Maine School Admin. Dist. No. 5, 941 F.2d 45 (1st Cir. 1991) for the proposition that respondent school district may not consider the purpose for which petitioners wish to make use of respondents' facilities in determining whether or not to grant their request for access, is misplaced. (Petitioners' Brief at 19, 35, 36).

In Grace Bible the United States Court of Appeals for the First Circuit held that a school district had improperly precluded a religious

organization access to public school facilities for the purpose of providing a free Christmas community dinner. The First Circuit based its holding upon the finding that the school district had created a public forum from which it could not constitutionally exclude religious organizations. However, in its holding the court noted that its decision might have been different if the district had established a "limited" forum as the court noted had been established in Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985).

By contrast, in conformity with Section 414 of the New York State Education Law, respondent school district herein has established a limited open forum. Therefore, Grace Bible is inapposite and the United States Court of

Appeals for the Second Circuit was correct in its analysis below.

III. New York State Education Law §414 does not effect an unconstitutional infringement on free speech by limiting the purposes for which public school facilities may be used.

Petitioners rely on Widmar v. Vincent, 102 S.Ct 269 (1981), for the proposition that "state law cannot justify the denial of the federal constitutional right to equal access for private religious speech" (Petitioners' Brief at 13), and that the denial of access for religious purposes is content-based discrimination of religious speech (Petitioners' Brief at 20-22). Thus, they argue that respondents' reliance on Section 414 of the New York State Education Law for denying petitioners access to their facilities, in the circumstances surrounding this case, is

unsupportable. However, petitioners' reliance on Widmar v. Vincent is misplaced.

In Widmar, this Court held that a state university could not deny access to university facilities to students who desired to conduct religious meetings on campus. The Court noted that "[t]hrough its policy of accommodating their meetings, the University [had] created a forum generally open for use by student groups," and noted that the Court "has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum" (102 S.Ct 269, 273, fn5). Widmar involved the use of university property by student groups, where access to a vast array of such groups had been granted, so that a public forum for

student groups had been created. Therefore, the Court found that the university could not deny access to a student group based on the religious content of the intended speech, absent a showing that such restriction was necessary and narrowly drawn to serve a compelling governmental interest. Id. at 274.

By contrast, the present case involves outside organizations and groups meeting on public school property. In addition, the respondent school district has not afforded access to a vast array of organizations, but has instead complied with the prescriptions of Section 414 of the New York State Education Law in granting access only for certain enumerated purposes. The respondents are therefore not measured by

the same standards as the university in Widmar, and have clearly met the requirement of reasonableness of their exclusion.

Similarly, petitioners' reliance on Board of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), is also misplaced. (Petitioners' Brief at 21). As indicated by the Second Circuit in its decision below, this Court decided Mergens purely on statutory grounds noting that it did not need to decide whether the First Amendment requires the same result. As a result, the enactment and application of §414 with its list of limited purposes for which school facilities may be used, does not contravene the free speech protections contained in the First Amendment and petitioners cannot successfully rely on

Mergens for the proposition that once one outside group is allowed in by respondents, they may not refuse to allow in all other groups, irrespective of the purpose for which use of the facilities is sought.

Although this Court in Mergens held there is federal statutory authority that allows the establishment of student bible clubs in public schools if other non-curriculum related student clubs have been permitted to meet on school district property, there is neither a statutory requirement nor a United States Supreme Court ruling extending this authority to permit the use of public school property for religious purposes by outside organizations.

As stated above, the present case deals with the application of an outside

organization to meet on public school facilities for a religious purpose. In their brief, petitioners stress the family values orientation of the film they want to screen at respondent school district's facility in an attempt to obfuscate the fact that their intention is to impart a religious message and perspective through the film. The reality is they wish is to make use of public school facilities to communicate a religious message.

Clearly, the exclusion of the use of public school property for religious purposes is "reasonable" because the exclusion of such category avoids the appearance to the community that the school district endorses and supports a religious message and purpose, in violation of the Establishment Clause.

See Lemon v. Kurtzman, 403 U.S. 602 (1971). By precluding the use of public school facilities for religious purposes, school districts may also avoid the appearance of promoting one particular religious viewpoint in violation of the Establishment Clause, and dissention among the diverse religious groups in the various communities in the state that might result should the use of public school property for religious purposes create such an appearance. (See, Perry Education Assn. v. Perry Local Educators' Assn., 103 S.Ct 948 (1983).

Furthermore, in Perry Education Assn. v. Perry Local Educators' Assn., 103 S.Ct 948, (supra), this Court ruled as constitutional the exclusion of a rival union from access to the public school mail system while granting access

to the representative union. This Court noted that such exclusion was reasonable in light of the "substantial alternative channels that remain open for union-teacher communication to take place" (Id. at 959).

Similarly, petitioners do not claim that they are faced with a situation whereby they will be precluded from engaging in the desired expressive activity if they are not granted access to the respondent school district's facilities. There is no evidence to indicate that petitioners could not rent another facility located within the community to show their film to communicate their religious message.

Amici further submit that the exclusion of petitioners from respondents' facilities does not exhibit

unconstitutional hostility toward religion. (Petitioners' Brief at 36). The use of public school property for religious purposes is merely one category of usage that the legislature has determined is not appropriate for inclusion in the categories authorized by Education Law §414. This exclusion reflects concerns of both the state and the school districts over both establishment clause considerations and uses not directly related to the educational mission of the schools. (See, Trietley v. Board of Educ. of the City of Buffalo, 65 AD2d 1, supra). Also, here, as in Perry, there is "no indication that the school board [or the state legislature] intended to discourage one viewpoint and advance another" by denying access to public school property

for religious purposes. Perry, supra at 957. In addition, while "viewpoint discrimination is, of course, impermissible regardless of the nature of the forum . . . . [and w]hile under some circumstances a disparity between the government's proclaimed justification for denying access to its property and its actual practice might be evidence of viewpoint discrimination", no evidence of any such intent by the state legislature or the respondent school district has been advanced. (Student Coalition for Peace v. Lower Merion School Dist., 776 F.2d 431, 437-38 (3d Cir 1985), citing Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985)).

As further noted by this Court in Perry, the key to the decisions cited by petitioners in support of the premise

that the exclusion of religious uses of public school property is discrimination against religious speech, "was the presence of a public forum." Perry, supra at 960. Although the Court in Perry determined that the forum at issue was nonpublic rather than a limited public forum, the choice of which categories of uses of public property will be permitted in a limited public forum is governed by the same standards as that of a nonpublic forum. In a limited public forum,

> when speakers and subjects are similarly situated, the state may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the state may draw distinctions which relate to the special purpose for which the property is used. (Id.).

Because a school district is only authorized to create a limited public forum, and because a school district is

not authorized to include religious purposes as one of the genre of uses of such limited public forum, religious speech is not equally situated to that of the types of expression authorized on public school property by §414 of the Education Law. Therefore, use of public school facilities for religious purposes may be constitutionally excluded.

IV. Public policy dictates that public school boards in New York State, consistent with their right to direct the educational mission of their schools, be afforded the opportunity to set forth the permissible uses of school facilities in accordance with New York State Education Law §414.

Central to the purpose of this nation's system of public education is the preparation of students for citizenship in a democratic society. Toward this objective, public school officials and the school community must

conduct themselves in a manner which engenders among schoolchildren tolerance, understanding, and a sense of community. Intrinsic to such a commitment is the obligation to avert any direct or indirect involvement in activities which detract from the achievement of this aspiration. (See, Bethel School Dist. No. 403 v. Fraser, 106 S.Ct 3159 (1986)).

New York State public school buildings are not as to the general community traditional public fora, (Travis v. Owego-Appalachin School Dist., 927 F.2d 688 (2d Cir. 1991), supra; Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676 (2d Cir. 1988), supra; Brandon v. Board of Educ., 635 F.2d 971, 980 (2d Cir. 1980), cert. denied, 454 US 1123 (1981), supra; see, Trietley v. Bd. of Educ. of the City of

Buffalo, 65 AD2d 1 (1978), supra, citing Matter of Ellis v. Allen, 4 AD2d 343, 344 (1957), Poulos v. New Hampshire, 345 US 395, 405 (1953); Stein v. Oshinsky, 348 F.2d 999, 1001 (1965)). However, pursuant to New York State Education Law §414, the State's public school districts may elect to open their facilities for designated purposes which serve to further this mission. To compel access to public school facilities irrespective of the purpose for which use of said property is sought, as petitioners propose, is to repudiate the above stated principles.

Furthermore, New York public school boards, as elected bodies representing the interests of their community, must be afforded the discretion to determine whether a requested use of its facilities

should be granted where such use could reasonably be viewed by the public as being supported or encouraged by the school district, and deference should be afforded to such determinations. In addition, public policy also mandates these public officials be provided with such authority.

In Hazelwood School District v. Kuhlmeier, 108 S.Ct. 562 supra, this Court held that school officials must be allowed to place restrictions on student speech as related to school sponsored activities. According to the Court, school officials must be able to retain the right to set high standards for student speech, and to disallow such student speech when it fails to meet the prescribed standards. (Id. at 570). Although Kuhlmeier dealt with the

censorship of certain articles authored by students in a school-sponsored newspaper, the Court recognized that decisions made by school officials concerning the image portrayed by the district must be afforded deference by a reviewing court, "so long as their actions are reasonably related to legitimate pedagogical concerns" (Id. at 571). Section 414 of the New York Education Law provides guidelines within which a school board is authorized to exercise discretion and control over public school facilities, and to make decisions regarding the use of school property according to the principles which support both the State's and the nation's system of public education.

In addition, this Court has also recognized that local school authorities

should be afforded broad discretion in the day-to-day operations of the school district, and emphasized the limiting language of the Supreme Court in Epperson v. Arkansas, 393 U.S. 97, 104-05 (1968), regarding the premise that courts should refrain from becoming involved in such matters.

Absent the authority to exercise such discretion, the Supreme Court's holding in Kuhlmeier and Epperson would be meaningless in regard to the use of public school facilities by outside organizations. Indeed, a school board would be forced to maintain a forum completely closed to use by members of the community or other groups that would otherwise further the educational mission of the school district so as to avoid having their facilities declared

completely open public fora, accessible to all, regardless of possible conflicts with the principles underlying the public education system.

CONCLUSION

NYSSBA, representing the interests of approximately 98 percent of the school boards in the State of New York, and the other Amici, respectfully request that this Court give great consideration to the implications of any decision it may make which restricts the ability of public school districts to operate public school facilities in a manner consistent with the educational mission of the public schools over which school boards have authority. (See, Hazelwood v. Kuhlmeier, 108 S.Ct 562, supra). If the state's public school districts, in accordance with the prescriptions of the

state legislature, are unable to direct the use of their buildings and property, it is likely that at least some element of the "special characteristics of the school environment" will be lost.

For the reasons stated above, the judgment of the court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1992.

LAMB'S CHAPEL, et al.,

Appellants.

v.

CENTER MORICHES
UNION FREE SCHOOL DISTRICT,et al.,

Appellees.

On Appeal From The United States Court
of Appeals For The Second Circuit

BRIEF OF THE RUTHERFORD INSTITUTE *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS

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No 91-2024

IN THE

Supreme Court of the United States

October Term, 1992.

LAMB'S CHAPEL, et al.,

Appellants,

v.

CENTER MORICHES
UNION FREE SCHOOL DISTRICT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE *AMICUS CURIAE*, IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

This case presents significant questions as to the equal protection before the law of religious persons and groups who desire to exercise First Amendment rights on an equal basis with other citizens on public school property generally open for free expression. The New York state and local school board policies that deny access to public school facilities for religious "purposes" constitute content-based invidious discrimination which, if sustained, will create a *religious apartheid* not unlike the Jim Crow laws that denied blacks the equal use of public facilities because of race. This Court should reject any arguments or purported constitutional doctrine that would sanction such a policy.

[1] Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

Amicus Curiae — The Rutherford Institute — has as one of its principal purposes the advancement of free speech and the elimination of discrimination against persons or groups based on their religious beliefs. The resolution of the issues presented by this case is not only important to the jurisprudence of the First Amendment, it is vital to the welfare of the Nation and the rights and freedoms of citizens in society.

Amicus Curiae is a non-profit religious corporation named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With its international office in Charlottesville, Virginia, The Rutherford Institute undertakes to assist litigants in most of the 50 states and to participate in significant cases relating to the Free Speech and the Religion Clauses. Counsel for *amicus curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

SUMMARY OF ARGUMENT

This case presents issues of paramount public importance. Lamb's Chapel and its pastor have been denied access during nonschool hours to public school facilities solely because of the religious content of their film series, "Turn Your Heart Toward Home." This denial has occurred even though the facilities are open to other citizens for assembly and speech purposes subject only to reasonable time, place and manner regulations. It is not hyperbole to label this subtle, but nevertheless invidious, policy as effecting a form of *religious apartheid* — a policy that separates and excludes citizens from the use of public facilities because of adherence to religion. This policy is not only *not* required by the Constitution, it is violative of precious, two-hundred-year-old freedoms granted by the First Amendment Free Speech and Religion Clauses, as reinforced by the Fourteenth Amendment Equal Protection Clause.

The unequal differentiation and exclusion of persons who desire to meet and express themselves on religious subjects is in its effect more severe than the *Plessy v. Ferguson*[2] "separate but equal" doctrine. The New York policy does not merely derogate religious persons to second class facilities, it accomplishes a total and complete exclusion from *all* publicly available school facilities — a virtual shutout of persons who wish to meet for religious purposes. And, unlike *Plessy*, the policy affords such persons *no* alternate "equal but separate accommodations" to meet and express themselves in the manner afforded to other citizens.

The reasoning of the Second Circuit Court of Appeals justifying the exclusion in this case is ill-conceived. Its rationale for decision is one of its own creation, supported only by its similarly ill-conceived precedents, and not by any decision of this Court. While this Court has permitted government to limit the use of publicly-owned facilities for speech purposes and to define what uses are permitted, it has never, *never* empowered government to declare a wholesale ban on speech in an open forum based solely on content without demonstrating a compelling state interest. And even then, any restriction of speech must be narrowly tailored and ample alternative opportunities for expression must otherwise be provided. *Perry Education Association v. Perry Local Educators' Association*, 460 U. S. 37, 45 (1983).

Departing from this approach, the Second Circuit has crafted a circular, outcome-oriented hybrid, what it calls the sub-category of the "limited" public forum. This hybrid would permit government to ban and exclude certain subject matter from otherwise open forums, notwithstanding the government's policy or practice vis-a-vis speech of similar content or the nature of the forum or the compatibility of the excluded speech with speech that is permitted. Under the Second Circuit's logic,

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[2] 163 U.S. 537 (1896).

"property remains a *nonpublic* forum as to all unspecified uses, . . . and exclusion of uses — even if based upon subject matter or the speaker's identity — need only be reasonable and viewpoint-neutral to pass constitutional muster." *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 679-80 (2d Cir. 1988) (emphasis added). But, as one court has said, "government property. . . does not automatically cease to be a designated public forum because the government restricts *some* speech on the property. Otherwise, the restriction of speech on government property would be self-justifying. The restriction would disprove any intent to create a designated public forum, and the failure to create a public forum would justify the restriction. The Supreme Court has not adopted such circular reasoning." *Hays County Guardian v. Supple*, 1992 U. S. App. LEXIS 18167 (5th Cir. August 10, 1992) (emphasis added).

Under the Second Circuit's approach, not only would the Free Speech Clause be defined away by the simplest grant or denial of access, government would be licensed in the process to favor or disfavor the content and form of expression. Meanwhile, fellow citizens would be unequally deprived of substantial associational and expressive liberties guaranteed by the Bill of Rights and the Civil War Amendments, and the liberties all citizens enjoy would be greatly diminished.

ARGUMENT

I. THE NEW YORK STATE AND CENTER MORICHES SCHOOL BOARD FACILITIES USE POLICIES PROMOTE A FORM OF RELIGIOUS APARTHEID, PERMITTING GOVERNMENT SYSTEMATICALLY TO DISENFRANCHISE AND EXCLUDE RELIGIOUS PERSONS FROM THE PUBLIC SQUARE.

Section 414 of the New York Education Law sets out ten purposes for which schoolhouse facilities may be used

throughout the State of New York. These purposes were summarized by the Second Circuit as follows:

> instruction; public library purposes; social, civic and recreational meetings; events for which admission fees are charged, if the fees are to be applied to educational and charitable (but not religious) purposes; elections and political meetings; civic forums and community centers; classes for mentally retarded minors; recreation and athletics; child care services during non-school hours; and graduation exercises held by not-for-profit elementary and secondary schools, provided no religious service is performed.

Lamb's Chapel v. Center Moriches Un. Free Sch. Dist., 959 F.2d 381, 386 (2d Cir. 1992) ("*Lamb's Chapel*").[3] The Center Moriches School Board has implemented this State policy by declaring that "[t]he school premises shall not be used by any group for religious purposes." *Id.* The issue is thus the constitutionality validity of (1) a state statute that has been judicially construed as banning the use of school facilities for religious purposes, and (2) an express policy of the Center Moriches school board which explicitly reaffirms that ban. In the latter instance, the law prohibits on its face the use of school facilities based on the *content* or *subject matter* of the anticipated expression, while permitting use for other purposes based on the content or subject matter of expression associated with those uses.

"'[W]here the State has opened a forum for direct citizen involvement,' exclusions bear a heavy burden of justification."[4]

[3] Religious meetings apparently are not "social" or "civic" meetings or forums. The Second Circuit has indicated that the failure of Section 414 to specify religious uses means that such uses are excluded, *citing Treitley v. Board of Educ.*, 409 N.Y.S.2d 912, 915 (4th Dep't 1978). *Id.* at 387.

[4] *Madison School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167, 175 and n.8 (1976), *quoted in Widmar v. Vincent*, 454 U. S. 263, 268 (1981).

This is because "the First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" *Heffron v. ISKCON*, 452 U. S. 640, 655 (1981), *quoting Kovacs v. Cooper*, 336 U. S. 77, 87 (1949). This right cannot be more paramount than when government opens up public facilities for the use of its citizenry and then selectively restricts access to those facilities to other citizens based on the "purposes" for which a facility is to be used.

The school board's denial of access of otherwise available public facilities for certain "uses" has a superficial content neutral ring to it. In support of this approach, the Second Circuit has opined that where a school district creates a "limited" public forum, "property remains a *nonpublic* forum as to all unspecified uses, . . . and exclusion of uses — even if based upon subject matter or the speaker's identity — need only be reasonable and viewpoint-neutral to pass constitutional muster." *Deeper Life Christian Fellowship v. Board of Education*, 852 F.2d 676, 679-80 (2d Cir. 1988) (emphasis added).

The language of the school board's policy expressly proscribes "uses" for religious "purposes." By definition, "use" means the carrying out of a "purpose" and "purpose" means "something set up as an object or end to be attained." *Webster's Seventh New Collegiate Dictionary*, 694, 978 (1971). Here, the "object" of the meeting or gathering on public property cannot be readily separated from the content or subject matter of the meeting or gathering that is scheduled to occur. Thus, a statute permitting government to deny access for meetings based on their "purpose," in effect, permits government to ban expression based on the content or subject matter that is expected to occur at the meeting.

The ban or exclusion of persons from public property based on "use" related to "purpose" also inexorably requires choice by government with respect to the "preferred" permitted speech.

R.A.V. v. St. Paul, ___ U.S. ___, 112 S.Ct. 2538 (1992). In the case of the ban on the use of public school facilities for religious purposes, it is as though government had endorsed nonreligion in general as the preferred viewpoint, approving only secular topics as legitimate for propagation on public property that is otherwise open for expression. By denying facilities because of "uses" for religious "purposes", religious persons and groups are disadvantaged if not stigmatized as second class citizens in the community. The level playing field of the public forum is thus unfairly imbalanced against the religious message. To paraphrase Justice O'Connor in a related context, New York's policy "conveys a message to [religious persons] that they are...not full members of the political community, and an accompanying message to [nonreligious persons] that they are...favored members of the political community." *County of Allegheny v. American Civil Liberties Union*, 492 U. S. 573, 109 S.Ct. 3086, 3118 (1989). The New York policy disqualifies religious persons from the public arena, creates an inferior class of citizenry, and brands religious views as suspect and disfavored by government.

It is thus not hyperbole to declare that the New York's policy, if sustained, will effect *religious apartheid* — an official government policy excluding religious persons from the use of otherwise available public property. The exclusion of blacks from privately-owned lunch counters, or their relegation to the back of the bus is tame compared to this New York policy which contains a wholesale ban and outright exclusion from *public* facilities based on the content of the message. The *Plessy v. Ferguson* "separate but equal" doctrine, though broader in reach, pales in light of a government policy that effects "total exclusion and total inequality" — disabling the speech of religious citizens and disenfranchising them from an important part of the public arena. In a democratic society *all* citizens should have an equal right to pursue and advocate their views in the public square so long as those views are not plainly

incompatible with the nature of the forum and the other speech activities that occur there. This Court should, in its review of this case, adhere to the high standards it has traditionally required of government to justify restrictions which interfere with speech based on the content of the message or other historically "suspect" classifications that discriminate against religious minorities as between religion and nonreligion.

II. THE NEW YORK PUBLIC SCHOOL FACILITIES USE POLICIES DRAW DISTINCTIONS BASED ON THE CONTENT OF SPEECH AND MUST BE ADJUDICATED UNDER THE COMPELLING STATE INTEREST/STRICT SCRUTINY STANDARD.

Flat bans directly excluding protected expression have rarely survived strict judicial scrutiny.[5] And even bans on what is frequently viewed as less protected "commercial speech" routinely fail under close constitutional review.[6] Where protected expression is concerned, citizens can be excluded from open forums "*only* when the exclusion is *necessary* to serve a compelling state interest and the exclusion is *narrowly drawn*

[5] *Bigelow v. Virginia*, 421 U. S. 809, 822 (1975) (ban on abortion ads); *Widmar v. Vincent*, 454 U. S. 263, 270 n. 7 (1981) (ban on religious speech on college campus); *cf. Schad v. Ephraim*, 452 U. S. 61 (1981) (township-wide ban on live entertainment invalid for substantial overbreadth); *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620, 636-637 (1980) (ban on door-to-door canvassing substantially overbroad and invalid because "a direct and substantial limitation on protected activity...cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect" and which cannot "be better served by measures less intrusive than a direct prohibition...").

[6] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976) (striking down a state ban on drug price advertisement); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U. S. 530 (1980) (striking down ban on utility bill inserts on controversial topics); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U. S. 557 (1980) (striking down ban on promotional displays); *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60 (1983), (striking down ban on condom advertisements).

to achieve that interest." *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U. S. 788, 800 (1985)(emphasis added); *Widmar v. Vincent*, 454 U. S. 263, 267-270 (1981); *United States v. Grace*, 461 U. S. 171, 177 (1983); *Cohen v. California*, 403 U. S. 15, 26 (1971). And even if a particular state interest is deemed to be "compelling," there are countervailing constitutional principles, including Free Speech, Free Exercise and Fourteenth Amendment Equal Protection interests that may nevertheless render it insufficiently compelling to override and counterbalance the constitutional interests in question.[7] "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider v. State*, 308 U. S. 147, 161 (1939).

There can be little question that the Lamb's Chapel film series, "Turn Your Heart Toward Home," is pure speech protected by the First Amendment. Even if the film's contents were exclusively religious, this Court has expressly indicated that religious expression — including religious worship and Bible study — enjoys the same protection as "political" or "ideological" or other speech under the First Amendment. *See Widmar v. Vincent*, 454 U. S. 263, 269 (1981).[8] Since the State of New York has opened up public school facilities to a multitude of "uses," the applicable standard of review as to the forum

[7] *See*, **for Free Speech interests**: *Bigelow v. Virginia*, 421 U. S. 809, 822 (1975); *Widmar v. Vincent*, 454 U. S. 263, 270 n. 7 (1981); *cf. Roberts v. Jaycees*, 468 U. S. 609 (1984); **for Free Exercise interests:** *Wisconsin v. Yoder*, 406 U. S. 205 (1972); and **for Equal Protection interests:** *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980).

[8] *Cf. Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1911) (nude dancing) (plurality opinion); *Texas v. Johnson*, 109 S.Ct. 2533 (1989) (flag burning); *Spence v. Washington*, 418 U. S. 405 (1974) (flag burning); *Tinker v. Des Moines School District*, 393 U. S. 503 (1969) (black arm bands in school).

status of the public school property must be the "designated" public forum standard where:

> [T]he Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.

Cornelius v. NAACP Legal Defense and Education Fund, 473 U. S. 788, 802 (1985).

In determining the government's policy and practice, it is necessary to review the facts peculiar to the case at hand.[9] Here, the State of New York has opened school facilities to be used for at least ten categories of "purposes" which include "social," "civic," "recreational," "elections," "political meetings," "civic forums," "instruction," "community centers," and other activities. These categories include virtually the entire universe of expression and seem to exclude *only* commercial and profit-oriented activities and, as interpreted by the New York courts, "religious" activities, which apparently do not fall under permitted "social" or "civic" purposes. The state and local policies thus effect a blatant exclusion from the use of otherwise available public facilities based on the religious content of the anticipated subject matter of the meeting. Moreover, the prohibition, in effect, classifies groups and people differently based on the content of the message they wish to advance or the purpose for which permission to meet is sought.

[9] *See Widmar v. Vincent*, 454 U. S. 263 (1981) (university campus); *Madison School District v. Wisconsin Public Employment Relations Comm'n*, 429 U. S. 167 (1976) (school board meeting) and *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546 (1975) (municipal auditorium); *Board of Airport Commissioners v. Jews for Jesus*, Inc., 107 S.Ct. 2568 (1987) (airport terminal); *Lee v. International Society for Krishna Consciousness*, ___ U. S. ___, 112 S.Ct. 2709 (1992).

A. THE PROBLEM WITH THE SECOND CIRCUIT'S DEFECTIVE CONTENT-BASED ANALYSIS.

The Second Circuit abandons the traditional "designated" public forum analysis in this case and substitutes in its place what it terms as "the subcategory of 'limited public forum,' the classification that allows [school property] to remain non-public except as to specified uses." 959 F.2d at 386, *citing Deeper Life Christian Fellowship v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir. 1988). Relying on *Deeper Life* progency, it asserts that "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." *Travis v. Owego-Apalachin School District*, 927 F.2d 688, 692 (2d Cir. 1991). Thus, in the name of "uses" and "genres," government can literally determine the constitutional standard by which its exclusion of speech will be judged. If a certain "use" or "genre" is prohibited on the property, that exclusion by definition is subject only to review under a reasonableness and non-viewpoint discrimination standard. If the use or genre is permitted, on the other hand, then any exclusion within the permitted use is subject to the higher compelling state interest standard, narrow-tailoring, and the availability of ample alternatives.

The rubric of "use," "purpose" and "genre" is "word play" (*R.A.V. v. St. Paul*, 112 S.Ct. at 2548) employed to circumvent this Court's proscriptions against content based discrimination and to deny citizens equal access to public property. Notwithstanding the mask of rhetoric, the facial distinctions drawn by the policy among "purposes" effects a total ban on religious expression in public school facilities, the type of content-based ban that has previously been held unequivocally unconstitutional in *Police Dept. v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980); and *R.A.V. v. St. Paul*, ___ U.S. ___, 112 S.Ct. 2538 (1992).

The fallacy of the Second Circuit's reasoning has been exposed by the reasoning of decisions from other Circuits. For example, the Third Circuit has criticized such an analysis as permitting government "upon the most tenuous and internally inconsistent grounds, [to] pick and choose those to whom it grants access for expressive activity simply by framing its access policy to carve out even minute slices of speech which, for one reason or another, it finds objectionable." *Gregoire v. Centennial School District*, 907 F.2d 1366, 1378 (3d Cir. 1990). And the Fifth Circuit recently pointed out in a case involving "access" to a purportedly "closed" university campus that:

> Government property... does not automatically cease to be a designated public forum because the government restricts some speech on the property. Otherwise, the restriction of speech on government property would be self-justifying. The restriction would disprove any intent to create a designated public forum, and the failure to create a public forum would justify the restriction. The Supreme Court has not adopted such circular reasoning.

Hays County Guardian v. Supple, 1992 U. S. App. LEXIS 18167 (5th Cir. August 10, 1992). Content-based restrictions of the type found here, no matter what rhetorical disguise they may take, cannot be justified except upon a showing of a compelling state interest. As this Court stated in the case of *R.A.V. v. St. Paul, supra*, at 4671:

> The First Amendment does not permit [government] to impose special prohibitions on those speakers who express views on disfavored subjects. . . . The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.[10]

[10] *See also The UWM Post, Inc. v. Board of Regents*, 774 F.Supp. 1163 (E.D. Wisc. 1991) (University hate crimes regulation overbroad and vague).

B. THE APPLICABLE PUBLIC FORUM STANDARD.

In "designated" or "limited" public forum cases, the government's intent in opening a forum is to be measured against its "policy," its "practice," the "nature of the forum" and "the compatibility of the speech with the other speech that is to occur in the forum." *Cornelius*, 473 U.S. 788, 800 (1985). These factors go beyond the facial distinctions drawn by the statute and require a review of what speech is and has been permitted in the forum, the nature of the forum and the compatibility of the speech in question with the other permitted speech.

1. The Policy.

Under the New York statute, virtually the entire universe of speech *is* permitted in public school facilities. The *only* evident exclusions are commercial or profit-oriented speech (for which there is ample constitutional doctrine to justify greater regulation) and religious speech, an entire subject matter that unlike commercial speech enjoys the highest level of constitutional protection. The government's policy on its face thus *opens* the forum to virtually all speech, but subjects religious speech to unique disabilities.

2. The School Board's Practice.

The Center Moriches school board found that the film series "Turn Your Heart Toward Home" had religious content that transgressed its policy, but nevertheless permitted a Salvation Army Benefit Band Concert, a Southern Harmonizer's Gospel Music Concert, and a program on "Psychology and the Unknown." The length to which the Second Circuit parses the Salvation Army and Gospel Music programs to *deny* their religiosity is in stark contrast to its summary acceptance of the School Board's suspicion that "Turn Your Heart Toward Home," "would have religious connotations" and "appear[ed] to be church related . . ." *Lamb's Chapel*, 959 F.2d at 384. As

a matter of practice, the record shows — notwithstanding the nuances the Second Circuit purports to divine between the "Turn Your Heart Toward Home" family movie series and these other gospel music or "New Age" programs — that the school board opened public school facilities to *multiple* programs with a religious content and purpose.

3. The Nature of the Forum and The Compatibility of the Speech With the Forum.

It has been recognized that "[c]onsideration of a forum's *special attributes* is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic *nature* and *function* of the particular forum involved." *Lee v. ISKCON*, ____ U. S. ____, 112 S.Ct. 2709, 2712 (1992) (O'Connor, J. concerning) (citations omitted; emphasis added). The forum here is an off-hours school facility that is available for use generally by the community. The forum is *not* physically limited like a jail[11] or a military base[12], nor is it the subject of private speech offered concurrently with governmental use, for example, like speech offered in a comment period before a school board meeting[13], or a school mail system[14] or a governmental fund drive.[15] The "purposes" for which the forum may be used in this case — "social, civic," etc — are basically broad and unrestricted and not dissimilar to those Lamb's Chapel proposes. Except for commercial and religious speech, virtually any type of speech activity (even politics) is permitted. As was recognized in a similar case with a contrary result: "the Constitution forbids a

[11] *Adderley v. Florida*, 385 U.S. 39 (1966).

[12] *Greer v. Spock*, 424 U.S. 828 (1976).

[13] *Madison School District v. Wisconsin Public Employment Relations Comm'n*, 429 U.S. 167 (1976).

[14] *Perry Education Association v. Perry Local Education Association*, 460 U.S. 37 (1983).

[15] *Cornelius v. NAACP*, 473 U.S. 788 (1985).

state to enforce unconstitutional exclusions from a forum *generally open* to the public, even though the forum was not required to be open in the first place." *Gregoire v. Centennial School District*, 674 F. Supp. 172 (E.D. Pa. 1987), *aff'd*, 907 F.2d 1366 (3d Cir. 1990)(emphasis added).

Notwithstanding the Second Circuit's facile distinctions, the nature of the forum in this case rivals the "open public forum" found in *Widmar v. Vincent*, where the University of Missouri at Kansas City mistakenly argued that the Establishment Clause required the exclusion of religious gatherings on campus.[16] These arguments, as they relate to this case, are discussed next.

4. The Establishment Clause as A Compelling State Interest To Deny Access For Religious Programs.

New York alleged in the District Court below that its ban on religious meetings in public school facilities is required by the Establishment Clause. Although the same arguments were advanced in the *Widmar* case, the proper analytical approach was framed by Justice Lewis F. Powell, Jr., in the *Widmar* majority opinion:

> The question is *not* whether the creation of a religious forum would violate the Establishment Clause. The University has opened its facilities for use by student groups, and *the question is whether it can now exclude groups because of the content of their speech*....In this text, we are unpersuaded that the primary effect of the

[16] The Second Circuit's contention that *Widmar*'s holding is narrow and limited to a university setting is a position that does not appear to be shared by this Court, as its most recent pronouncements concerning the Establishment Clause have made evident. For example, in *Mueller v. Allen*, 463 U. S. 388, 398-399 (1983), this Court cited *Widmar* for the proposition that a program that neutrally provides state assistance to a broad spectrum of citizens is "not readily subject to challenge under the Establishment Clause." *Cf. Corporation of Presiding Bishop v. Amos*, 483 U. S. 327 (1987); *Bowen v. Kendrick*, 487 U. S. 589 (1988).

> public forum, open to all forms of discourse, would be to advance religion.

Id. at 273 (emphasis added). The *Widmar* analysis, properly framed, makes clear that an "equal access" policy [is not necessarily] incompatible with [the Supreme Court's] Establishment Clause cases." 454 U. S. at 271. Such a policy does not "offend" the Establishment Clause" if it passes the tri-partite test of *Lemon v. Kurtzman*, 403 U. S. 602, 612-614 (1971): (1) the legislature must have adopted the law with a secular purpose; (2) the statute's primary effect must be one that neither advances nor inhibits religion, and (3) the law must not result in an excessive entanglement of government with religion. If the policy fails to comply with any one of these elements, it constitutes an impermissible establishment of religion.

With regard to the question of secular purpose, by granting access to a wide range of activities and purposes, the State is obviously not fulfilling or advancing a nonsecular purpose. It is providing a place for community life to flourish, with all of the concomitant benefits. The more important question is the policy's "primary effect" and whether it impermissibly advance or inhibits religion. In *Widmar*, this Court was "unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." 454 U. S. at 273. Justice Powell pointed out that it was possible, even foreseeable, that religious groups might actually benefit from use of the facilities, but this was determined to be an "incidental," and not a primary, advancement of religion.[17] Two factors were deemed

[17] *Citing Committee on Religious Liberty v. Nyquist*, 413 U. S. 756, 771 (1973); *Roemer v. Maryland Public Works Bd.*, 426 U. S. 736 (1976); *Hunt v. McNair*, 413 U. S. 734 (1973); *McGowan v. Maryland*, 366 U. S. 420 (1977). It has been pointed out that by renting school facilities, religious groups merely share benefits with all community groups. "If religious groups benefit, it is in spite of, rather than because of, their religious character." *Country Hills Christian Church v. Unified School District No. 512*, 560 F. Supp. 1207, 1218 (D. Kan. 1983).

important to show that the benefit to religion from use of the state facilities by religious groups would be "incidental": (1) "an open forum policy in a public university does not confer any imprimatur of State approval on religious sects or practices;" (*Widmar*, 454 U. S. at 274) and (2) "the forum is available to a broad class of nonreligious as well as religious speakers...." (*Id.*).

These factors are evident in the present case. First, the vigorous tradition of advocacy and robust speech in our culture presumes general knowledge among the citizenry of the openness of public facilities for multiple community uses. As in *Widmar*, the actual use of school facilities by a broad spectrum of groups carries with it "an important index of secular effect." 454 U. S. at 274. Moreover, "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Board of Education v. Mergens*, 496 U. S. 226, ____, 110 S.Ct 2356, 2371(1990). And any concern about official sponsorship would be much less evident where a school facility is used after hours on a temporary basis at night or on a weekend where, at most, the only school personnel on the premises, if any, are custodial personnel. "[T]here is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." *Board of Education v. Mergens*, 496 U. S. at ____, 110 S.Ct. at 2372.[18]

[18] The equal access, public forum rule is so logical and compelling that it was frequently followed by federal courts even *before* the Supreme Court's decision in *Widmar*. Pursuant to this rule, courts have directed school boards to make school facilities available to outside groups during nonschool hours even though the boards considered the groups reprehensible. *See, e.g., Lawrence University Bicentennial Commission v. City of Appleton, Wisconsin*, 409 F. Supp. 1319 (1976); *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973) (en banc); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978), 643 F.2d 1034 (1981), *vacated*, 102 S. Ct. 626 (1981); *on remand*, 679 F.2d 64 (5th Cir. 1982); *cf. O'Hair v. Andrus*, 613 F.2d 931 (D. C. Cir. 1979).

There is an additional consideration. The "primary effect" prong of *Lemon* requires that the state policy not *inhibit* religion. The primary effect of singling out religion for special discrimination *vis-a-vis* nonreligion is to *inhibit* religion. As Professor Tribe has pointed out, "[a] message of *exclusion*. . . is conveyed where the state refuses to let religious groups use facilities that are open to other groups." L. Tribe, *American Constitutional Law* 1175(2d.ed.1988). New York's discriminatory rule thus itself fails to satisfy the Establishment Clause requirement that government remain *neutral* toward religion.

Finally, as for entanglement, the state's prohibition on uses for religious purposes is fraught with more entanglement questions that if religious uses were permitted. As this Court noted in *Widmar*:

> [t]he University would risk *greater* "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech." Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. There would also need be a continuing need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U. S. at 272, n. 11 (emphasis added).

In short, there is no Establishment Clause violation here that would justify the content-based exclusion of the Free Speech rights of persons who wish to espouse religious views.

III. THE GENERALLY WORDED PROSCRIPTION CONTAINED IN THE SCHOOL BOARD POLICY FAILS TO GIVE PERSONS SEEKING ACCESS TO SCHOOL FACILITIES FAIR WARNING ABOUT THE KINDS OF EXPRESSION THAT

WERE PERMITTED, AND OWING TO ITS INCURABLE LACK OF STANDARDS, IT IS SUBSTANTIALLY OVERBROAD AND UNCONSTITUTIONALLY VAGUE AND IMPERMISSIBLY VESTS STANDARDLESS AUTHORITY IN PUBLIC OFFICIALS.

It is respectfully submitted that the "no religious purpose" policy in the present case does not provide sufficient guidance or warning to Lamb's Chapel or Pastor Steigerwald or, for that matter, to any other person as to what "uses" might contain prohibited religious "purposes" and those "uses" that would not. On its face, the policy prohibits use "by any group for religious purposes." *Lamb's Chapel*, 959 F.2d at 387. Presumably even religious groups could use school facilities for "social or civic purposes", but would be excluded for "religious purposes." But would, for example, the film series on the family "Turn Your Heart Toward Home" qualify as a "social" or "civic" use rather than a "religious" use? The Third Circuit has pointed out in a similar case, that "[t]he term "civic" can be stretched or contracted to fit whatever the school district decides" (*Gregoire v. Centennial School District*, 907 F.2d at 1374-75) and no doubt the word "social" can be stretched even further. It is thus difficult to determine how the School Board Clerk could discern that the "Turn Your Heart Toward Home" film series was sufficiently religious to be banned, whereas the Salvation Army Band Benefit Concert and the Southern Harmonizer's Gospel Concert were not. And how would the Clerk treat a "God and Country" rally with strong political overtones — would it serve a religious purpose, or a political one and, if both, would it necessarily be excluded? In light of such irreconcilable inconsistencies, and notwithstanding the facile distinctions drawn by the Second Circuit, it is not possible for ordinary citizens to know what is permitted or not permitted. Nor is it clear who will decide what is covered by the policy and by what standard.

The lack of standards and the total discretion vested in the official enforcing the school board policy unfortunately also "has the potential for becoming a means of suppressing a particular point of view." *Forsyth County v. Nationalist Movement*, ____ U. S. at ____, 112 S. Ct. 2395, 2401 (1992), *citing Heffron v. ISKCON*, 452 U. S. 640, 649 (1981). The chilling effect from potential arbitrary enforcement that inevitably results from such standardless discretion cannot be avoided. *See, City of Lakewood v. Plain Dealer Publishing Company*, 486 U. S. 750, 755-769 (1988). The no religious "purposes" policy falls within the four corners of *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987). There, the Board of Commissioners of Los Angeles International Airport sought to ban all speech in the airport terminal except expressive activity "related" to airport purposes. Here, the policy bans all uses for "religious purposes." This Court found fault with excluding speech under such undefined and unprincipled "standards:"

> Much nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—may not be "airport-related," but is still protected speech *even in a non-public forum. See Cohen v. California*, 403 U.S. 15 (1971). Moreover, the vagueness of this suggested construction itself presents serious constitutional difficulty. The line between airport-related speech and nonairport-related speech is, at best, murky. The petitioners, for example, suggest that an individual who reads a newspaper or converses with a neighbor at LAX is engaged in permitted "airport-related" activity because reading or conversing permits the travelling public to "pass the time." ...We presume, however, that petitioners would not so categorize the activities of a member of a religious or political organization who tries to "pass the time" by distributing leaflets to fellow travellers.

> In essence, the result of this vague, limiting construction would be to give LAX officials alone the power to decide in the first instance whether a given activity is airport related. Such a law that "confers on police a virtually unrestrained power to arrest and charge persons with a violation" of the resolution is unconstitutional because "[t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." *Lewis v. City of New Orleans*, 415 U.S. 130, 135-136 (1974) (Powell, J. concurring). *See also, Houston v. Hill*, 482 U. S. 451, 465 (1987); *Kolender v. Lawson*, 461 U. S. 352, 358 (1988). (Emphasis supplied.)

Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U. S. at 576 (1987). This is precisely the kind of murky decision-making that this Court has found infirm as a matter of law because "the opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." *Id.*

IV. THE POLICY IMPOSES A PRIOR RESTRAINT ON SPEECH WITHOUT ADEQUATE CONSTITUTIONAL SAFEGUARDS AND IS THEREFORE UNCONSTITUTIONAL.

The respective State and local policies governing public use of the school facilities imposed a *prior restraint* on Lamb's Chapel's and Pastor Steigerwal's free speech. The policy is invalid because it reserves to a school board official the right to review materials as to their suitability for use in the forum and constitutes a prior restraint on speech.

Although all prior restraints are not unconstitutional *per se*[19], *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, n. 10

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[19] Time, place and manner restrictions, if specifically and narrowly drawn so as to preclude the exercise of content control, may be upheld. *See*, M. Nimmer, *Nimmer on Freedom of Speech*, Sec. 4.06[B] (Student Ed. 1984).

(1963), "[a]ny system of prior restraints of expression comes to [the Supreme] Court bearing a heavy presumption against its constitutional validity." *Id.*; *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980)(per curiam); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971)(per curiam); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Indeed, the "presumption against prior restraints is heavier - and the degree of protection broader - than that against limits on expression imposed by criminal penalties." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975). Our jurisprudence imposes this burden on public officials because of "[o]ur distaste for censorship - reflecting the natural distaste of a free people - [which] is deep-written in our law." *Id.* at 553.[20]

A central feature of prior restraint analysis concerns whether the government body granting approval for expressive activity within a given forum has unbridled discretion over the forum's use. A prior restraint is regarded as impermissible if approval by the government is "not a matter of routine" but involves "appraisal of facts, the exercise of judgment and the formation of an opinion by the [government body]." *Southeastern Promotions*, 420 U.S. at 554. The judgment as to the "religiosity" of particular programs — as is readily evident from the Second Circuit's analysis of the film series and the Salvation Army Band and Southern Harmonizer's Gospel Con-

[20] *See also Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 896 (D.C. Cir. 1984) (transit authority's refusal to lease artist space to display in its subway stations poster critical of Reagan administration was clear-cut and impermissible prior restraint); *Community for Creative Non-Violence v. Turner*, 714 F. Supp. 29, 32-33 (D.D.C. 1989) (transit authority regulation requiring all persons seeking to engage in "free speech activity" on the transit authority's property obtain permit from central business office held facially invalid since it created an impermissible prior restraint on free speech).

certs —is subjective in the extreme, and readily "lacks sufficient safeguards, including neutral criteria for decisionmaking, to 'obviate the dangers of a censorship system.'" *Id., quoting Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

The dangers posed by administrative discretion and indefinite standards have been emphasized time and again by this Court. As mentioned above, it has consistently struck down permit or license cases in which unconstrained executive or administrative discretion has effectively denied a plaintiff use of public places to engage in expressive activity. The lesson of numerous older decisions was summarized in *Niemotko v. Maryland*, 340 U.S. 268 (1951), in which the Court said:

> In those cases this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a *prior restraint* on freedom of speech, press and religion, and, *in the absence of narrowly drawn, reasonable and definite standards for the officials to follow* must be invalid.

Id. at 271 (emphasis added). The same concern was addressed in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), in which the Court struck down a law authorizing denial of a parade permit whenever city officials deemed that "the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." *Id.* at 140-50. The Court found this law defective because it failed to provide "narrow, objective, and definite standards to guide the licensing authority." *Id.* at 151. More recently, in *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975), the Court held that the refusal of a municipal board to permit the performance of the rock musical "Hair" in a municipal auditorium, characterized by the Court as a public forum, amounted to a prior restraint in violation of the First Amendment. On the basis of

indirect reports, the board concluded that the production would not be "in the best interest of the community." The elements of prior restraint were implicated because the "board was empowered to determine whether the applicant should be granted permission — in effect, a license or permit - on the basis of its review of the content of the proposed production." *Id.* at 554. Lacking "precise and clear standards," the board's exercise of authority to bar the musical performance was invalidated.

Clearly, the school board's written policy prohibiting, without standards, "use" of public school facilities for "religious purposes" succumbs to the same Constitutional infirmity. The school board's action imposing a bar on Lamb's Chapel's and Pastor Steigerwald's film series "in advance of actual expression," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975), only highlights the clear-cut prior restraint upon their protected speech. The record suggests that the bar from the school facilities implicates an "appraisal of facts, the exercise of judgment, and the formation of opinion" by school board personnel and thus indicates an impermissible prior restraint. *Southeastern Promotions, Ltd.*, 420 U. S. at 554.

The school board's practice here, which is in essence part and parcel of an overall license scheme, requires an analysis of the *content* of a proposed use to determine whether it will advance a "religious purpose." The policy offers no precise and clear standards to guide school authorities in determining whether the proposed use falls under the terms of the policy.

> A licensing system need not effect total suppression in order to create a prior restraint. In *Interstate Circuit v. Dallas*, 390 U.S. 676, 688 (1968), it was observed that the evils attendant on prior restraint "are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression." In that case, the Court held that a prior restraint was created by a system whereby an administrative board in Texas classified films as "suitable for young persons" or "not suitable for young persons." The "not suitable" films were not suppressed, but exhibitors were required to have special licenses and to advertise their classification in order to show them...

Southeastern Promotions, Ltd., 420 U.S. at 556 n.8. A system which relies on vaguely defined classifications and definitions poses a substantial danger to the exercise of free speech by persuading or intimidating prospective speakers to modify their speech in order to avoid less favored classifications and attendant regulations. It is respectfully submitted that the New York policy, on its face, constitutes a prior restraint on speech insofar as it vests standardless and unbridled discretion in school officials who must decide which uses have "religious purposes." The Second Circuit's own extensive, but unpersuasive, analysis attempting to distinguish the Lamb's Chapel film series from other religious uses that have been permitted only shows that the policy is readily susceptible to personal predilections and sensitivities, whether it be the sensitivity of the school board clerk, the sensitivity of the judge or jury, the "sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man." *Coates v. Cincinnati*, 402 U.S. 611, 613 (1971). For this reason, and because the policy could be applied in a manner that constitutes a prior restraint, the policy should be declared invalid.

The settled rule is that a system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. at 58. This Court has held that a system of prior restraint runs afoul of the First Amendment if it lacks specified procedural safeguards:

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must

> rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

Southeastern Promotions, Ltd., 420 U.S. at 560. *See generally* M. Nimmer, *supra*, Sec. 4.05; L. Tribe, *American Constitutional Law* 1059-61 (2d ed. 1988).

In the case *sub judice*, the school system's absolute restraint on the film series lacked all of these safeguards. First, total suppression of Lamb's Chapel's and Pastor Steigerwald's speech was accomplished "by a single stroke of the pen." At that point, the burden fell to the would-be speaker, Lamb's Chapel and its Pastor, to vindicate their rights through the present costly and burdensome legal action. *See* Jeffries, *Rethinking Prior Restraint*, 92 Yale L.J. 409, 422 (1983). It should also be noted that those suppressing their speech operated in the relative informality of an administrative procedure substantially shielded from effective public scrutiny and participation. Second, the absolute restraint imposed by New York provides no mechanism for prompt judicial review.[21] The school board policy lacks adequate procedural safeguards and fails to meet any of the procedural safeguards specified by the Court in *Southeastern Promotions, Ltd.* as essential to ensure the constitutionality of a prior restraint.

It is of no consequence to prior restraint analysis that Lamb's Chapel or Pastor Steigerwald may have used this or some other public or private forum to express their views. Even if another public or private forum had been available, that fact

[21] In particular, the vague and standardless language of the school policy is subject to constitutional challenge. Where government discretion cannot effectively be constrained by narrow, precise and objective guidelines, this Court has required that its exercise of authority be closely supervised by judicial authority. These policies clearly offer no provision for judicial review. *See Freedman v. Maryland*, 380 U.S. 51 (1965).

alone would not justify an otherwise impermissible prior restraint. *See Southeastern Promotions*, 420 U.S. at 556. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

V. NEW YORK'S DENIAL OF BENEFITS FOR RELIGIOUS REASONS CONSTITUTES INVIDIOUS DISCRIMINATION AGAINST LAMB'S CHAPEL AND ITS PASTOR IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

When fundamental and personal rights are at stake, this Court has subjected state classification of persons and objects to strict scrutiny. In the early case of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), this Court recognized that laws involving the rights to vote, restraints on free speech, interferenced with political organizations, freedom of assembly, *and discrimination against religious*, national or racial *minorities*, require a "more searching judicial inquiry" under the Equal Protection Clause.

Since that time, the Court has identified certain classifications as "suspect" and others involving "fundamental rights," both of which are subjected to "strict scrutiny" by the Court and require a showing that there is a compelling state interest "necessary to the accomplishment of some permissible state objective." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Classification in the area of race, *religion* and nationality have been deemed suspect because they affect discrete and insular minorities.[22]

[22] *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Widmar v. Vincent*, 454 U.S. 263 (1981).

Likewise, even though a law may be designed to serve neutral ends, if it is applied in a manner to discriminate on otherwise impermissible constitutional grounds, or if its impact or effect constitutes an equal protection violation, then the statute as applied may be held unconstitutional. The classic statement of this principle was in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In that case, the supervisors of the County and City of San Francisco were empowered in their discretion to regulate the operation of laundries in wooden buildings, while laundries operating in brick or stone structures were not subject to regulation. Consent to operate wooden laundries was given to non-Chinese subjects, but withheld from Chinese subjects. The Court stated:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

118 U.S. at 373-374.

The equal protection principals set forth above clearly apply in the context of a public forum case, as well as in a public benefit case like this one, where persons are denied important public benefits granted to others without restriction. Thus, in *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), a statute that prohibited picketing except for labor disputes was invalidated on Equal Protection grounds because of its unequal treatment of the subject matter of speech. And as recently as *Zobel v. Williams*, 457 U.S. 55 (1982), this Court recognized that "when a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 60. Because the discrimination here is based on the traditional

"suspect" class of *religion*, the distinction is subject to strict scrutiny and the state must demonstrate a compelling state interest for the distinctions that have been drawn between beneficiaries.

In this regard, *Widmar v. Vincent*, 454 U.S. 263 (1981), continues to be helpful as a framework for analysis, as does the case of *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986). In those cases, it was demonstrated that the state's attempt to comply with what it believed were its Establishment Clause obligations failed to provide a sufficiently compelling state interest (let alone a rational basis) to justify the discrimination imposed against the students in question. *Id.* at 276.

In order for Establishment Clause obligations to be considered compelling in the present case, New York must show, as in *Widmar* and *Witters*, that a public benefit program *without* a religious exclusion would violate the tripartite test found in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Applying this test, it is clear as discussed above, that the Establishment Clause does *not* compel New York to draw the distinction against religious use that it has drawn.

CONCLUSION.

The context of the public property in this case is in the nature of a designated public forum in which citizens are free to engage in speech activities on public school facilities, subject only to reasonable time, place and manner restrictions. Although New York purports to exclude the use of the school facilities for "religious purposes," the validity of the latter restriction must be considered in the context of the overall policy which grants near universal access to school facilities, but excludes only religious and commercial purposes. In these circumstances, the state may not censor or draw distinctions with

respect to the content of speech except under very stringent limitations which are not satisfied here.

Under the rhetorical mask, of "use," "genre" and "purpose," the Second Circuit would permit New York to unduly suppress and banish religious speech or exercise from the public square, subjecting religious persons to a *de facto* regime of *religious apartheid.* Apart from the obvious invidious implications of such a policy, it should not be permitted if only because "[t]hose who won our independence knew that the 'path of safety' lies in free discussion." *Whitney v. California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring). The logic of the position of the State of New York unfortunately runs contrary to this central historical and political truth. The exclusion of religious topics from otherwise open public forums is not only not mandated, it is not permitted, by the Constitution, nor should it be. As U.S. Circuit Judge Harold Leventhal observed in another case where Free Speech and Establishment Clause interests clashed: "[t]he Establishment Clause is not an abstraction in logic. It permits an accommodation in furtherance of the spirit and purpose of the First Amendment." *O'Hair v. Andrus*, 613 F.2d 931, 937 (D. C. Cir. 1979).

For these compelling reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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Respectfully submitted,

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